

---

---

**U.S. DEPARTMENT OF JUSTICE**



**OFFICE OF  
PROFESSIONAL RESPONSIBILITY**

**ANNUAL REPORT**

**2013**

---

**U.S. Department of Justice  
Office of Professional Responsibility**

**Fiscal Year 2013 Annual Report**

Introduction.....	1
Jurisdiction and Functions of OPR.....	1
Intake and Initial Evaluation of Complaints and Correspondence .....	4
OPR Workload Summary for Fiscal Year 2013 .....	4
OPR Inquiries in Fiscal Year 2013 .....	7
<i>Inquiries Opened in Fiscal Year 2013 .....</i>	7
<i>Inquiries Closed in Fiscal Year 2013.....</i>	8
OPR Investigations in Fiscal Year 2013 .....	10
<i>Investigations Opened in Fiscal Year 2013 .....</i>	10
<i>Investigations Closed in Fiscal Year 2013.....</i>	11
Policy and Training Activities in Fiscal Year 2013 .....	14
Examples of Inquiries Closed in Fiscal Year 2013 .....	15
Summaries of Investigations Closed in Fiscal Year 2013.....	24
Conclusion.....	50

## **OPR Annual Report for Fiscal Year 2013**

### **Introduction**

The Office of Professional Responsibility (OPR) was established in the Department of Justice (Department or DOJ) by a December 9, 1975 order of the Attorney General to ensure that Department employees perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. This is OPR's 38th Annual Report to the Attorney General, and it covers Fiscal Year 2013 (October 1, 2012 through September 30, 2013).

### **Jurisdiction and Functions of OPR**

OPR has jurisdiction to investigate allegations of professional misconduct made against Department of Justice attorneys when the allegations relate to the exercise of the attorney's authority to investigate, litigate, or provide legal advice. This includes allegations relating to the actions of the Department's immigration judges and Board of Immigration Appeals members. OPR also has jurisdiction to investigate allegations of misconduct against DOJ law enforcement personnel that are related to allegations of attorney misconduct within the jurisdiction of OPR. In addition, OPR has authority to investigate other matters when requested or authorized to do so by the Attorney General or the Deputy Attorney General.

Misconduct allegations that OPR historically investigates include *Brady*, *Giglio*, Federal Rule of Criminal Procedure 16, and civil discovery violations; improper conduct before a grand jury; improper coercion, intimidation, or questioning of witnesses; improper introduction of evidence; lack of candor or misrepresentations to the court and/or opposing counsel; improper opening statements and closing arguments; failure to represent competently and diligently the interests of the government; failure to comply with court orders, including scheduling orders; unauthorized disclosure of confidential or secret government information; failure to keep supervisors apprised of significant developments in a case; and the exercise of prosecutorial discretion based on improper purposes. In addition, OPR examines cases in which courts have awarded Hyde Amendment fees to a defendant based on a finding that the government's conduct was frivolous, vexatious, or in bad faith.

OPR receives allegations from a variety of sources, including judicial opinions and referrals, private individuals and attorneys, and other federal agencies. Some of the most important sources are internal Department referrals. All Department employees are obligated to report to their supervisors any evidence of non-frivolous allegations of misconduct, or they may bring the information directly to the attention of OPR. Supervisors, in turn, are obligated

to report to OPR any matters in which the alleged misconduct is serious. Supervisors and employees are encouraged to contact OPR for assistance in determining whether the matter should be referred to OPR. Department employees are required to report to OPR all misconduct findings made by judges.

Upon receipt, OPR reviews each allegation and assesses whether further inquiry or investigation is warranted. If so, OPR determines whether to conduct an inquiry, in which it typically gathers documents and information and obtains written submissions from subjects and components, or a full investigation, in which it also interviews relevant witnesses. This determination is a matter of investigative judgment and involves consideration of many factors, including the nature of the allegation, its apparent credibility, its specificity, its susceptibility to verification, and the source of the allegation. Although some matters begin as investigations, OPR typically will open a matter as an inquiry and then assess the information obtained prior to conducting an investigation. An inquiry or investigation may have more than one Department attorney as the subject.

Each year, OPR determines that the majority of complaints do not warrant further inquiry because, for example, the complaint is outside OPR's jurisdiction, pertains to matters addressed by a court where no misconduct has been found, is frivolous on its face, or is vague and unsupported. In some cases, OPR initiates an inquiry because more information is needed to assess the matter. In such cases, OPR may request additional information from the complainant or obtain a written response from the attorney against whom an allegation was made. OPR also may review other relevant materials such as pleadings and transcripts. Most inquiries are resolved with no misconduct finding based on the additional written record.

In cases that are not resolved, and in all cases in which OPR believes misconduct may have occurred, OPR conducts a full investigation, including a review of the case files and interviews of witnesses and the subject attorney(s). Interviews of subject attorneys are conducted by OPR attorneys and are transcribed by a court reporter. The subject is given an opportunity, pursuant to a confidentiality agreement, to review the transcript and to provide a supplemental written response. All Department employees have an obligation to cooperate with OPR investigations, once they have been provided warnings concerning the further use of their statements, and to provide information that is complete and candid. Employees who fail to cooperate with OPR investigations may be subject to formal discipline, including removal from federal service.

If a Department attorney resigns or retires during the course of the investigation, OPR ordinarily completes its investigation in order to better assess the litigation impact of the alleged misconduct, and to permit the

Attorney General and Deputy Attorney General to consider the need for changes in Department policies or practices. In certain cases, however, the Office of the Deputy Attorney General will approve termination of such investigations if it deems such action is in the best interest of the Department. Terminated investigations may nevertheless result in notifications to the appropriate state bar authorities if the Department determines that the evidence warrants a notification.

OPR reports the results of its investigations to the Office of the Deputy Attorney General and to the appropriate management officials in the Department. In cases involving U.S. Attorney's Offices, this includes notifying the Director of the Executive Office for U.S. Attorneys (EOUSA). OPR includes in its communications with management officials discussion of any trends or policy issues that OPR believes require attention.

During Fiscal Year 2011, the Department established the Professional Misconduct Review Unit (PMRU), which reports to the Deputy Attorney General and is responsible for all disciplinary actions relating to OPR findings of professional misconduct against DOJ attorneys employed by certain components, including the Criminal Division and EOUSA. The PMRU reviews only those cases in which OPR finds intentional or reckless professional misconduct and determines whether those findings are supported by the evidence and the applicable law.<sup>1</sup> The PMRU also determines the appropriate level of discipline in those cases.

In matters in which OPR concludes that a Department attorney engaged in professional misconduct and the DOJ attorney is not employed by a component within the purview of the PMRU, pursuant to Department policy, OPR recommends a range of discipline. Although OPR's recommendation is not binding on the management officials responsible for discipline, if an official decides to take an action that is outside the range of discipline recommended by OPR (whether it is harsher or more lenient), the management official must notify the Office of the Deputy Attorney General in advance of implementing that decision.

Once a disciplinary action for a DOJ attorney is final, OPR notifies the appropriate bar disciplinary authorities of any violations of applicable bar rules. OPR makes notifications to bar counsel at the direction of the PMRU (for matters under their jurisdiction) or the Office of the Deputy Attorney General, once they have completed their disciplinary process. The Department's bar notification policy includes findings of intentional professional misconduct, as well as findings that a subject attorney acted in reckless disregard of a

---

<sup>1</sup> OPR's findings of poor judgment or mistake continue to be referred to the Department component head, EOUSA, and to the relevant U. S. Attorney, for appropriate action.

professional obligation or standard. OPR does not make a bar notification when the conduct in question involved exclusively internal Department interests that do not appear to implicate a bar rule. In addition, OPR reviews reports issued by the Office of the Inspector General (OIG) concerning Department attorneys to determine whether the relevant state bar counsel should be notified of the misconduct at issue.

OPR also reviews case files and statistical data relating to matters under investigation to identify any misconduct trends or systemic problems in the programs, policies, and operations of the Department. Trends and systemic problems are brought to the attention of appropriate management officials.

### **Intake and Initial Evaluation of Complaints and Correspondence**

In Fiscal Year 2013, OPR received 819 complaints and other correspondence and memoranda, of which 351, or 43%, were from incarcerated individuals. Some of these matters did not relate to issues under the jurisdiction of OPR, or merely sought information or assistance, and were referred to the appropriate government agency or Department component. OPR determined that 93 of the matters warranted further review by OPR attorneys and they were opened as inquiries. In addition, OPR opened 33 matters as investigations. When information develops in an inquiry indicating that further investigation is warranted, the matter is converted to an investigation.

The remaining matters were determined not to warrant an inquiry or investigation by OPR because, for example, they sought review of issues that were being litigated or that had already been considered and rejected by a court; were frivolous, vague, or unsupported; or simply requested information. Those matters were addressed by experienced management analysts through correspondence or referral to another government agency or Department component. A supervisory or experienced OPR attorney also reviewed all such dispositions.

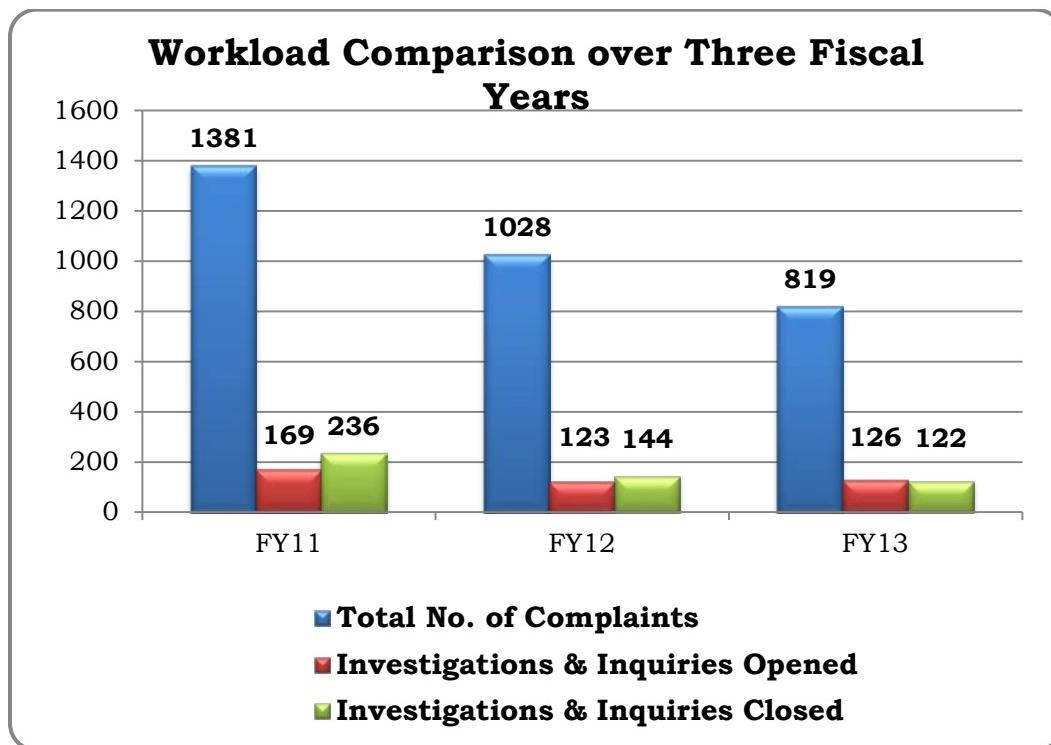
### **OPR Workload Summary for Fiscal Year 2013**

Graphs 1 and 2 depict the number of complaints and correspondence matters OPR received, as well as the number of investigations and inquiries OPR opened and closed, in the past three fiscal years. Graph 3 depicts the number of inquiries and investigations that were pending at the end of each of the last three fiscal years. In Fiscal Year 2013, OPR opened 126 inquiries and investigations, and closed 122. More specifically, OPR opened 93 inquiries, and closed 89, and opened 33 investigations, while closing 33. During the fiscal year, OPR received 819 complaints and correspondence matters, which reflects a 20% decrease from Fiscal Year 2012. At the end of Fiscal Year 2013, there were 27 inquiries and 27 investigations pending, which, as compared to

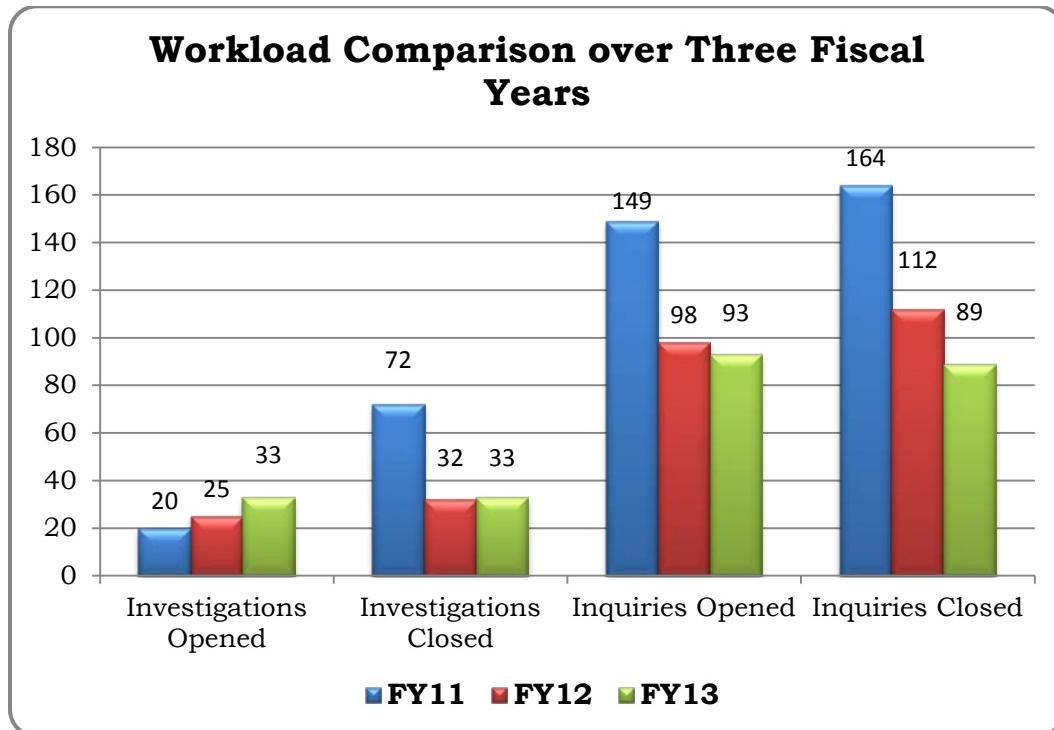
Fiscal Year 2012, reflects 30% fewer inquiries and the same number of investigations.

In Fiscal Year 2013, OPR opened slightly more inquiries and investigations than in Fiscal Year 2012, despite receiving significantly fewer complaints in Fiscal Year 2013. While OPR in Fiscal Year 2013 closed fewer inquiries and investigations than it closed in Fiscal Year 2012, OPR continued to maintain a reasonable number of pending inquiries and investigations, while eliminating a backlog of older cases. OPR accomplished these results with a significantly reduced attorney staff. At the end of Fiscal Year 2013, OPR operated with 16 line attorneys assigned to its investigations. In Fiscal Year 2011, by comparison, OPR was staffed with 18 line attorneys, in addition to 4 attorneys detailed to OPR from other components. OPR sustained a 27% reduction in attorney staffing over the past three years.

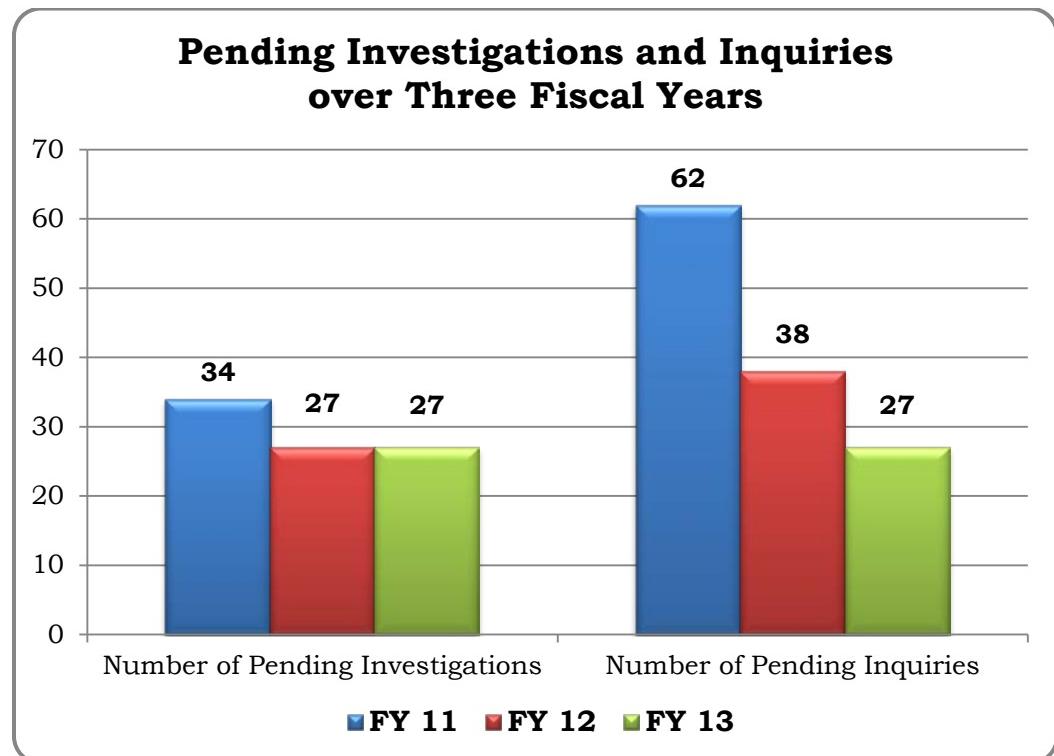
**Graph 1**



**Graph 2**



**Graph 3**



## **OPR Inquiries in Fiscal Year 2013**

*Inquiries Opened in Fiscal Year 2013:* The sources of the complaints for the 93 matters designated as inquiries opened in Fiscal Year 2013 are set forth in Table 1.<sup>2</sup>

**Table 1**

<b>Sources of Complaints Against Department Attorneys in Inquiries Opened in FY 2013</b>		
<b>Source</b>	<b>Complaints Leading to Inquiries</b>	<b>Percentage of All Inquiries</b>
Judicial opinions & referrals, including referrals by Department employees of judicial criticism <sup>3</sup>	48	51.6%
Department components, including self-referrals (unrelated to judicial findings of misconduct)	18	19.4%
Private attorneys	15	16.1%
Private parties	7	7.5%
Other sources	4	4.3%
Other agencies	1	1.1%
<b>Total</b>	<b>93</b>	<b>100%</b>

The nature of the allegations against Department attorneys contained in the 93 inquiries is set forth in Table 2. Because some inquiries included more than one allegation of misconduct, the total number of allegations exceeds 93.

<sup>2</sup> OPR evaluates all allegations made by Department employees that non-DOJ attorneys have engaged in misconduct, in order to determine whether the Department will make a referral to a state bar disciplinary organization. The 93 matters referred to above do not include matters involving proposed bar notifications involving non-DOJ attorneys.

<sup>3</sup> This category includes self-reporting by Department employees and officials of judicial criticism and judicial findings of misconduct.

**Table 2**

<b>Types of Misconduct Allegations in Inquiries Opened in FY 2013</b>		
<b>Type of Misconduct Allegations</b>	<b>Number of Allegations</b>	<b>Percentage of Allegations</b>
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	26	22.2%
Abuse of authority, including abuse of prosecutorial discretion	23	19.6%
Misrepresentation to the court and/or opposing counsel	14	11.9%
Improper remarks to a grand jury, during trial, or in pleadings	11	9.4%
Failure to comply with court orders or federal rules	11	9.4%
Failure to comply with DOJ rules and regulations	8	6.8%
FBI Whistleblower complaints	6	5.1%
Conduct of Immigration Judges	4	3.4%
Lack of fitness to practice law	3	2.6%
Interference with defendants' rights	3	2.6%
Lateness ( <i>i.e.</i> , missed filing deadlines)	2	1.7%
Other	2	1.7%
Unauthorized disclosure of information, including grand jury information protected by Fed. R. Crim. P. 6(e)	1	0.9%
Failure to competently or diligently represent the client's interests	1	0.9%
Failure to maintain active bar membership	1	0.9%
Conflict of interest	1	0.9%
<b>Total</b>	<b>117</b>	<b>100%</b>

Inquiries Closed in Fiscal Year 2013: OPR closed a total of 89 inquiries in Fiscal Year 2013 involving allegations against Department attorneys.<sup>4</sup> The matters involved 133 separate allegations of professional misconduct (many

---

<sup>4</sup> OPR may designate more than one DOJ attorney as the subject of an inquiry. OPR closed an additional 62 inquiries involving proposed bar notifications for misconduct of non-DOJ attorneys.

matters involved multiple allegations). The manner in which the 133 allegations were resolved in Fiscal Year 2013 is set forth in Table 3.<sup>5</sup>

**Table 3**

<b>Categories of Inquiry Allegations Resolved in FY 2013</b>		
<b>Type of Resolution</b>	<b>Number of Occurrences</b>	<b>Percentage of Occurrences</b>
No merit to matter based on review of allegation	72	54.1%
Performance or management matter. Referred to employing component	17	12.7%
No merit to allegation based on preliminary inquiry	15	11.3%
Inquiry closed because further investigation not likely to result in finding of misconduct	12	9.0%
More appropriately handled by another component or agency	7	5.3%
FBI Whistleblower complaint	5	3.8%
Issues previously addressed. No further action required by OPR	2	1.5%
Consolidated with already open miscellaneous matter, inquiry, or investigation	2	1.5%
Other	1	0.8%
<b>Total</b>	<b>133</b>	<b>100%</b>

<sup>5</sup> When an inquiry is converted to an investigation, the initial inquiry is not counted as a closed matter and thus is not included in these statistics. Rather, the matter is included in the investigations statistics. OPR does not make misconduct findings without conducting a full investigation. In Fiscal Year 2013, 32 inquiries were converted to investigations.

## **OPR Investigations in Fiscal Year 2013**

*Investigations Opened in Fiscal Year 2013:* OPR opened 33 investigations in Fiscal Year 2013, which were based on complaints from a variety of sources, as reflected in Table 4.

**Table 4**

<b>Sources of Complaints Against Department Attorneys in Investigations Opened in FY 2013</b>		
<b>Source</b>	<b>Complaints Leading to Investigations</b>	<b>Percentage of All Investigations</b>
Department components, including self-referrals (unrelated to judicial findings of misconduct)	15	45.5%
Judicial opinions & referrals, including referrals by Department employees of judicial criticism <sup>6</sup>	14	42.4%
Private attorneys	3	9.1%
Private parties	1	3.0%
<b>Total</b>	<b>33</b>	<b>100%</b>

Some of the 33 investigations that OPR opened involved multiple attorney subjects. There were 85 separate allegations of misconduct (many investigations involved multiple misconduct allegations). The subject matter of the 85 allegations is set out in Table 5.

---

<sup>6</sup> This category includes self-reporting by Department employees and officials of judicial criticism and judicial findings of misconduct.

**Table 5**

<b>Types of Misconduct Allegations in Investigations Opened in FY 2013</b>		
<b>Types of Misconduct Allegations</b>	<b>Number of Allegations</b>	<b>Percentage of Allegations in Investigations</b>
FBI Whistleblower complaints	20	23.5%
Abuse of authority, including abuse of prosecutorial discretion	12	14.1%
Failure to comply with DOJ rules and regulations	11	12.9%
Misrepresentation to the court and/or opposing counsel	10	11.7%
Failure to maintain an active bar membership	9	10.6%
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	7	8.2%
Failure to comply with court orders or federal rules	4	4.7%
Improper remarks to a grand jury, during trial, or in pleadings	3	3.5%
Failure to competently or diligently represent the client's interests	2	2.4%
Conflict of interest	2	2.4%
Lack of fitness to practice law	2	2.4%
Failure to comply with federal law	2	2.4%
Interference with defendants' rights	1	1.2%
<b>Total</b>	<b>85</b>	<b>100%</b>

Investigations Closed in Fiscal Year 2013: OPR closed 33 investigations in Fiscal Year 2013. Some of these investigations included multiple attorney subjects, and two included non-attorney subjects (typically, these are law enforcement officers). Of the 33 investigations, OPR found professional misconduct in 18, or approximately 55% of the matters it closed. Of the 18 matters in which OPR found professional misconduct, 7 involved at least 1 finding of intentional professional misconduct by a Department attorney.<sup>7</sup> In 13 of the 18 matters, OPR found that a Department attorney engaged in professional misconduct by acting in reckless disregard of an applicable

<sup>7</sup> OPR finds intentional professional misconduct when it concludes that an attorney violated an obligation or standard by: (1) engaging in conduct with the purpose of obtaining a result that the obligation unambiguously prohibits; or (2) engaging in conduct knowing its natural or probable consequence, and knowing that the consequence is a result that the obligation or standard unambiguously prohibits.

obligation or standard.<sup>8</sup> In resolving a matter, OPR may resolve one allegation by concluding, for example, that the attorney engaged in intentional misconduct, but resolve another allegation in the same matter by concluding that the attorney acted recklessly.

In Fiscal Year 2013, OPR made a larger number of misconduct findings as compared to Fiscal Year 2012, both in terms of total numbers (18 in 2013 as compared to 14 in 2012), as well as in percentage of closed cases (55% of closed cases in Fiscal Year 2013 resulted in misconduct findings, as compared to 44% in Fiscal Year 2012).

The 18 misconduct findings in Fiscal Year 2013 related to 45 allegations of misconduct (some matters included more than one allegation of misconduct). Table 6 below depicts the 45 allegations sustained in the 18 misconduct cases closed during Fiscal Year 2013.

---

<sup>8</sup> OPR finds that an attorney has engaged in professional misconduct based upon the reckless disregard of a professional obligation or standard when it concludes that the attorney: (1) knew, or should have known, based on his or her experience and the unambiguous nature of the obligation, about the obligation; (2) knew, or should have known, based on his or her experience and the unambiguous applicability of the obligation, that the attorney's conduct involved a substantial likelihood that he or she would violate or cause a violation of the obligation; and (3) nevertheless engaged in the conduct, which was objectively unreasonable under all of the circumstances.

**Table 6**

<b>Types of Misconduct Allegations in Closed Investigations with Findings of Misconduct in FY 2013</b>	<b>Number of Misconduct Allegations</b>	<b>Percentage of Misconduct Allegations</b>
Misrepresentation to the court and/or opposing counsel	13	29.0%
Failure to comply with DOJ rules and regulations	9	20.0%
Failure to competently or diligently represent the client's interests	7	15.5%
Failure to comply with <i>Brady</i> , <i>Giglio</i> , or Fed. R. Crim. P. 16 discovery	6	13.3%
Failure to maintain an active bar membership	4	8.9%
Other	2	4.4%
Abuse of grand jury or indictment process	1	2.2%
Failure to comply with Principles of Federal Prosecution	1	2.2%
Failure to keep client informed	1	2.2%
Failure to comply with federal law	1	2.2%
<b>Total</b>	<b>45</b>	<b>100%</b>

Disciplinary action already has been initiated and implemented against attorneys in 6 of the matters in which OPR found professional misconduct. Disciplinary action was not initiated against attorneys in 7 instances because the subject attorney was no longer employed by the Department at the conclusion of OPR's investigation. OPR, however, referred the matters to state bar disciplinary authorities, where appropriate. Disciplinary action was initiated but still is pending in 5 matters at the close of Fiscal Year 2013. With respect to the 6 matters in which disciplinary proceedings were initiated and implemented, the subject attorneys in 4 of the matters were suspended and the subject attorneys in the other 2 matters received a written reprimand or written admonishment.

OPR also closed 9 investigations, or approximately 27% of the investigations closed in Fiscal Year 2013, with at least one finding that an attorney exercised poor judgment.<sup>9</sup> Five of those 9 matters also involved a

---

<sup>9</sup> OPR finds that an attorney has exercised poor judgment when, faced with alternative courses of action, the attorney chooses a course that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a finding of professional misconduct.

finding of professional misconduct and are included in the 18 matters that contained findings of professional misconduct. OPR refers poor judgment findings to the Department attorney's employing component for consideration in a management context. OPR also may recommend that management consider certain actions, such as additional training. Ten closed investigations, or approximately 30%, involved at least 1 finding that an attorney made an excusable mistake. Three of those 10 matters also included a finding of professional misconduct or poor judgment. Thus, of the 33 investigations closed, OPR found professional misconduct or poor judgment in 22 matters, or approximately 66%, substantially the same as Fiscal Year 2012, in which OPR found professional misconduct or poor judgment in 21 matters, or approximately 66% of the matters investigated that year.

### **Policy and Training Activities in Fiscal Year 2013**

During Fiscal Year 2013, OPR participated in policy development and training for the Department. OPR attorneys participated in numerous educational and training activities within and outside of the Department to increase awareness of the ethical obligations imposed on Department attorneys by statutes, court decisions, regulations, Department policies, and bar rules. During Fiscal Year 2013, an OPR attorney participated in a presentation in a media relations workshop focusing on the policies and ethical issues concerning contacts with the media. OPR attorneys also made presentations to attorneys in the Civil Rights and Civil Divisions and participated in orientation for new U.S. Attorneys. OPR attorneys made presentations to new Assistant U. S. Attorneys as part of the Department's orientation and training programs, and participated in training for other Department components relating to professional responsibility requirements, including training on discovery and *Brady* disclosure obligations.

On the international front, in conjunction with the Criminal Division's Overseas Prosecutorial Development Assistance and Training (OPDAT) program, OPR attorneys participated in presentations to international delegations about OPR's role in the Department and issues associated with professional ethics. An OPR attorney also is serving a detail through OPDAT to Bosnia to assist criminal justice officials in developing their criminal justice system.

OPR continued to serve as the Department's liaison to state bar counsels on matters affecting the professional responsibility of Department attorneys. Due to budgetary constraints, however, OPR attorneys were unable to attend the mid-year and annual meetings of the National Organization of Bar Counsel (NOBC), which address current trends in attorney regulation and discipline.

In accordance with the Department's policy, OPR notified the appropriate state bar disciplinary authorities of findings of professional misconduct against

Department attorneys and responded to the bars' requests for additional information on those matters. OPR also consulted with and advised other Department components regarding requests for notification to a state bar of instances of possible professional misconduct by non-DOJ attorneys. In 68 such matters that OPR opened during Fiscal Year 2013, OPR reviewed information relating to possible misconduct by non-DOJ attorneys, advised components regarding the applicable state bar rules, and rendered advice on whether bar notifications were warranted. In some cases, OPR notified the applicable bar disciplinary officials directly of the allegations of misconduct.

In addition, OPR continued to exercise jurisdiction over FBI, DEA, and ATF agents when allegations of misconduct against such agents related to allegations of attorney misconduct within the jurisdiction of OPR. OPR also continued to share with the OIG responsibility for reviewing and investigating (as appropriate) whistleblower complaints by FBI employees.

### **Examples of Inquiries Closed in Fiscal Year 2013**

The following are brief summaries for a representative sample of inquiries closed by OPR in Fiscal Year 2013.<sup>10</sup>

*Improper Coercion/Intimidation of a Witness.* A grand jury witness complained to OPR that a DOJ attorney attempted to interview her against her wishes before her grand jury appearance in a case in which her family member was the subject of the investigation. The grand jury witness further alleged that the DOJ attorney persisted in seeking to interview her even after she informed the DOJ attorney that she did not wish to be interviewed.

OPR conducted an inquiry and determined that the grand jury witness' allegations of professional misconduct lacked merit and were not supported by the evidence. OPR found that, consistent with DOJ policy and practice, the DOJ attorney properly sought to meet with the grand jury witness before the grand jury appearance for legitimate, investigative reasons, expressing to both the witness and the witness' attorney that the meeting was voluntary. The DOJ attorney promptly terminated the meeting after the witness made clear that she did not want to speak with the DOJ attorney before her grand jury appearance. OPR found no evidence that the DOJ attorney's conduct was intimidating, unprofessional, or otherwise improper. OPR accordingly closed

---

<sup>10</sup> To protect the privacy of the Department attorneys and other individuals involved in the inquiries summarized, as well as with the investigations summarized in the next section of this report, OPR has omitted names and identifying details from these examples. In addition, OPR has used female pronouns in the examples regardless of the actual gender of the individual involved. Male pronouns will be employed next year, as the genders alternate each year.

this matter because further investigation was not likely to result in a professional misconduct finding.

*Improper Closing/Rebuttal Argument.* A DOJ attorney reported judicial criticism by a court of appeals of her comments during the trial of a defendant convicted of conspiracy. The court of appeals criticized the DOJ attorney's cross-examination and closing remarks because the remarks could be viewed as suggesting that the jury should consider improper factors in reaching a verdict. Nonetheless, the court upheld the conviction, finding that the remarks did not likely influence the jury's verdict.

OPR conducted an inquiry and found that the DOJ attorney inappropriately phrased her questioning during trial but did not intend to deprive the defendant of a fair trial. OPR also found that the DOJ attorney's remarks during rebuttal fairly responded to defense counsel=s closing argument. OPR found no evidence that the DOJ attorney meant to suggest that the jury should infer guilt based on the improper factors. OPR concluded that, under these circumstances, further investigation was unwarranted because it was unlikely to result in a finding that the DOJ attorney engaged in professional misconduct.

*Improper Voir Dire.* An appeals court found that during *voir dire*, a DOJ attorney improperly used a personal incident to illustrate a point of law and improperly referred to organized crime figures even though the case did not involve organized crime. The court upheld the defendant's conviction, finding that the prosecutor's improper comments during *voir dire* did not seriously affect the fairness of the proceedings. OPR determined that because the DOJ attorney was not attempting to improperly influence the jury, her questions to the jury, while inappropriate, did not constitute misconduct. OPR referred the court's findings to the attorney's component as a training and performance matter.

*Failure to Honor Plea Agreement.* A defendant filed an appeal alleging that a DOJ attorney breached a plea agreement when she concurred with the recommendation of the U.S. Probation Office regarding the application of an enhancement for the defendant's role in the offense, and when she provided the court with information related to the defendant's conduct that had not been stipulated in the plea agreement. The government did not contest the appeal and stipulated to a remand for resentencing.

OPR conducted an inquiry and determined that the DOJ attorney's conduct did not constitute a clear and unambiguous violation of the plea agreement because the plea agreement allowed the government to respond to the presentence report and to bring to the court's attention all conduct by the defendant relevant to his sentencing. No provision in the plea agreement

prohibited the government from concurring with the Probation Office's recommendation, and the DOJ attorney's concurrence with the recommendation was factually and legally supported. Accordingly, OPR closed its inquiry without further investigation.

*Improper Examination of a Witness.* A court criticized a DOJ attorney for challenging a defendant on cross-examination by asking the defendant if a government witness had any bias against the defendant that would explain testimony against the defendant at trial. Although the court ruled that it was impermissible for the prosecutor to ask the defendant on cross-examination to comment on the credibility of a government witness, it concluded that the disputed questioning was brief, tangential, and at least partially justified. OPR determined that while the questions by the DOJ attorney ought not to have been asked, further investigation was unlikely to result in a finding of misconduct and declined to investigate further.

*Improper Examination of a Witness; Discovery Violation.* In a dissenting opinion, a circuit judge criticized the government for eliciting testimony on direct examination about an incriminating statement by the defendant that had not been disclosed to the defense in discovery prior to the trial. At trial, on direct examination, the law enforcement officer unexpectedly testified that the defendant, who was charged with the illegal possession of a firearm, had admitted that he slept in the room where the gun was found. On appeal, the government argued that the admission of the officer's testimony was harmless error, and a majority of the court agreed. Neither the majority nor the dissent questioned the prosecutor's good faith in asserting that she was surprised by the officer's unexpected testimony and did not find that her line of questioning constituted misconduct. Because further inquiry was unlikely to result in a finding of misconduct, OPR declined to investigate further.

*Failure to Comply with Brady and Giglio Discovery Obligations.* A district court found that the government withheld favorable evidence that would have supported the defendant's claim that he did not retaliate against a witness and did not attempt to intimidate or threaten the witness, but it denied the defendant's post-trial motion for a new trial on the ground that there was no reasonable probability that the outcome of the trial would have been different had the jury known about the withheld evidence. The court further concluded that the withheld evidence had little, if any, impeachment value and that the prosecution's failure to recognize the relevancy of the withheld evidence and produce it to the defense was inadvertent. Based upon a review of the record and the court's findings, OPR determined that further inquiry of the prosecutors' inadvertent oversight was unlikely to result in a finding of misconduct and declined to investigate further.

*Failure to Comply with Court Order.* A district court judge criticized a DOJ attorney for violating the court's evidentiary ruling by referring in closing

argument to words used in a 911 call that that the court had expressly ordered her to redact. Although the attorney redacted the 911 recording in accordance with the court's order, and also redacted a demonstrative exhibit she used during her closing argument, the attorney mentioned the redacted language when she referred to the 911 call during her closing argument. The court sustained defense counsel's objection to the remark and instructed the jury to disregard it but did not declare a mistrial. Instead, the court ordered the DOJ attorney to report the court's finding to DOJ management. The matter was reported to DOJ management, who in turn referred the matter to OPR.

OPR conducted an inquiry and determined that the attorney's reference to the redacted language was inadvertent. OPR's inquiry revealed that the attorney redacted the recording and printed text of the 911 call in accordance with the court's order. The transcript of the closing argument revealed that the attorney's reference to the redacted language occurred in isolation; she mentioned the language only once, and did so during the heat of argument. In addition, OPR credited the attorney's representation that she mentioned the language while displaying a PowerPoint slide of the redacted 911 text, which conformed to the court's order. Thus, despite the attorney's isolated reference to the redacted language, the slide that she displayed to the jury as the actual text of the 911 call made no reference to the redacted language. OPR closed its inquiry in this matter after concluding that further investigation was not likely to result in a finding of professional misconduct.

*Failure to Diligently Represent the Interests of the Client.* A DOJ supervisor notified OPR of a DOJ attorney's failure to timely inform the court and defense counsel of material factual errors contained in an affidavit she filed in support of an application for a search warrant. The court approved a search warrant for the defendant's residence based on the information contained in the affidavit. Following the execution of the search warrant, which resulted in the seizure of contraband, the defendant was arrested and charged but not detained pending trial.

Thereafter, the DOJ attorney's legal assistant sent her two e-mails informing her of the errors in the affidavit. According to the DOJ attorney, she inadvertently deleted the first e-mail without reading it. As to the second e-mail, the DOJ attorney stated that because the second e-mail also concerned a pressing, though unrelated matter, she focused only on the other matter and overlooked the information regarding the affidavit errors. When the DOJ attorney's co-counsel became aware of the errors and brought them to the DOJ attorney's attention, the DOJ attorney immediately interviewed the warrant affiant and requested a written report concerning the errors so that she could promptly disclose them to the defense. Upon further review, the DOJ moved to dismiss the case.

OPR conducted an inquiry and determined that, although the attorney had been careless in reading her e-mails, she nonetheless acted appropriately once she learned about the errors. OPR found no evidence that the attorney attempted to conceal the errors, or that the attorney ignored the errors after she learned about them. OPR closed its inquiry in this matter after concluding that further investigation was not likely to result in a finding of professional misconduct and referred the matter to the DOJ attorney's component to address in a management context.

*Improper Comment on the Defendant's Right not to Testify.* A court of appeals criticized a DOJ attorney for a speaking objection the attorney made during defense counsel's opening statement to the jury in a criminal trial. The court found the DOJ attorney inappropriately objected to a proper statement, violated the court's order prohibiting speaking objections, and improperly commented on the defendant's right to remain silent by suggesting that the defendant was the only person who could provide the evidence that defense counsel mentioned in opening. Although the court found that the DOJ attorney's objection and comment were "inexcusable" under the circumstances, the court concluded that the error was harmless and upheld the conviction.

OPR initiated an inquiry. The DOJ attorney acknowledged that the objection and comment were imprudent but insisted that she did not intend to comment on the defendant's decision not to testify at trial. OPR found that the DOJ attorney did not intentionally violate a court order because the court did not instruct counsel to refrain from making speaking objections until after the DOJ attorney made the comment at issue. OPR concluded that the DOJ attorney's comment was a spontaneous response to what the DOJ attorney believed to be highly improper and prejudicial arguments by defense counsel, and was not repeated. Although OPR found that the DOJ attorney's remark did not rise to the level of misconduct, OPR noted that the comment was at the very least imprudent and referred the matter to the DOJ attorney's component to address as a training and performance issue.

*Breach of Plea Agreement.* A court of appeals found that the government had breached its plea agreement at the defendant's sentencing hearing by introducing evidence of relevant conduct that contradicted a stipulation in the defendant's plea agreement. The defendant pled guilty to an offense and stipulated to the quantity of a controlled substance. A probation officer later submitted a presentence report (PSR), in which the probation officer concluded that the defendant should be held accountable for a higher drug quantity, based on two additional drug transactions. The DOJ attorney consulted with her supervisor, and based on the supervisor's guidance, introduced at the sentencing hearing evidence of the two other narcotics transactions referenced in the PSR in order to make all pertinent facts known to the court, thereby allowing the court to determine the appropriate drug quantity for sentencing purposes. The DOJ attorney, however, did not argue that the defendant

should be held accountable for the additional transactions. The court of appeals found that the introduction of evidence regarding the additional drug transactions constituted a breach of the plea agreement because it contradicted the drug quantity stipulation, and held that the district court committed plain error by allowing it.

OPR initiated an inquiry and found that the DOJ attorney acted appropriately by consulting with her supervisor about how to address the drug quantity calculation in the PSR. Although the DOJ attorney and her supervisor chose a course of action that led the court to find that the government had breached its plea agreement, OPR found that neither attorney intended that result. Rather, the DOJ attorney and her supervisor believed that they could assist the court by presenting evidence to explain the PSR's drug quantity calculation, while honoring the plea agreement by not asking the court to adopt the higher quantity for sentencing purposes. OPR found no evidence that the DOJ attorney or her supervisor sought to circumvent the drug quantity stipulation in the defendant's plea agreement. Although the introduction of the additional drug transaction evidence was ill-advised, OPR concluded that further investigation of the matter was unlikely to result in a professional misconduct finding and therefore referred the matter to the DOJ attorney's component to address in a management context.

*Misrepresentation/Misleading the Court; Failure to Disclose Brady/Exculpatory Information.* OPR received allegations from defense attorneys in a corporate prosecution completed a number of years ago that, during trial, DOJ attorneys suppressed exculpatory evidence and made material misrepresentations based on the allegedly suppressed evidence. The complaint alleged that the DOJ attorneys' conduct violated state rules of professional conduct and noted that similar complaints had been filed with state bar disciplinary authorities.

OPR initiated an inquiry and reviewed all relevant briefs and court decisions related to the underlying case. OPR also conferred with bar licensing authorities in other jurisdictions to which defense counsel made similar allegations.

OPR concluded that, although the defense attorneys had raised their claims both at trial and on appeal, the courts had made no findings that any DOJ attorney committed misconduct in the case. Moreover, the court of appeals held that the evidence in question was not material to guilt or innocence and, therefore, the government did not violate its obligations under the *Brady* doctrine. In light of the court of appeals' holding and information obtained from the bar licensing authorities to which defense counsel made similar allegations, OPR determined that the allegations did not warrant further investigation.

*Unprofessional/Unethical Behavior; Misleading the Court.* A DOJ attorney reported to OPR a magistrate judge's allegations that the DOJ attorney had violated a generally understood rule prohibiting forum shopping when presenting an application for a search warrant. Specifically, the magistrate judge alleged that after the judge's law clerk advised the DOJ attorney that the judge would probably not sign proposed orders authorizing production of telephone records without supporting affidavits or some other evidence of probable cause, the DOJ attorney submitted applications to a different magistrate judge, who authorized them.

OPR reviewed the underlying documents and e-mail correspondence and concluded that the DOJ attorney acted inappropriately and unprofessionally by sending a curt e-mail to the first magistrate judge and by failing to inform the magistrate judge that the DOJ attorney intended to provide applications to a different magistrate judge, who ultimately signed the search warrants.

Although OPR found that the DOJ attorney's communication was unprofessional, this lapse did not affect the validity of the applications that the attorney submitted to the approving magistrate judge, or indicate that the DOJ attorney acted in bad faith or in an attempt to subvert the law. Moreover, OPR found that the DOJ attorney cancelled the meeting at which the applications were to be presented to the initial magistrate judge and therefore the magistrate judge did not issue a formal ruling denying the applications that the DOJ attorney could have appealed to the district court judge.

OPR concluded that further inquiry or investigation into these allegations was unlikely to result in a finding of professional misconduct. Because OPR found that the DOJ attorney's communication with the magistrate judge was unprofessional and reflected poorly on the Department, however, OPR referred the matter to the DOJ attorney's component to be addressed in a management context.

*Whistleblower - Retaliation for Protected Disclosure.* A DOJ employee alleged that she made a protected disclosure to the FBI's Inspection Division concerning a "hostile work environment" that resulted from a dispute with a colleague. As a consequence of the dispute, the DOJ employee's supervisors limited her work communications concerning the topic at issue. OPR found that the restrictions on the DOJ employee's activities were put in place prior to her contact with the FBI's Inspection Division and therefore could not constitute retaliation for the alleged protected disclosure to the Inspection Division. OPR also found that the DOJ employee's complaint did not allege mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to the public health, as required by the whistleblower regulations. Accordingly, OPR notified the DOJ employee that OPR was terminating its investigation.

*Misrepresentation/Misleading the Court.* During a routine media search, OPR learned that a federal court had found that during pretrial litigation, federal prosecutors misrepresented material facts regarding the conduct of the defendant and the strength of the evidence against her. Based on the court's new understanding of the facts, it found that the defendant's conduct did not meet the elements of the charged crime and dismissed several counts of the indictment. The government filed an interlocutory appeal.

OPR monitored the appeal and reviewed the pleadings and hearing transcripts. OPR found that the court and the government differed in their interpretation of the statutory requirements for the charged offense. Because the prosecutor's representations were consistent with the government's interpretation of the statute, OPR concluded that the prosecutor did not misrepresent the government's evidence, and it closed the inquiry.

*Abuse of Prosecutive Authority; Interference with a Criminal Investigation; Improper Coercion/Intimidation of a Witness.* OPR learned that a court of appeals suggested, without actually finding, that it would be improper for the government to enter into a plea agreement with a cooperating witness restricting the witness' availability to the defense. The court rejected the defendant's argument that her conviction should be overturned, ruling that she failed to demonstrate that she had attempted to obtain information from the witness and was prevented from doing so because of restrictions in the witness' plea agreement. Because the court found no prejudice to the defense, and the court's opinion raised novel issues, OPR determined that further inquiry was unlikely to result in a finding of misconduct, and declined to investigate further. OPR agreed that the provision in the plea agreement was problematic and referred the matter to the DOJ component to address in a management context.

*Duty of Candor to the Court.* A district court found that a DOJ attorney submitted a declaration that contained inaccurate representations regarding communications with a juror, defense counsel, and the court. OPR initiated an inquiry. OPR found that the DOJ attorney was on military leave when she was asked to prepare the declaration at issue, and did not have access to her case file or DOJ e-mail account at that time. Thus, the DOJ attorney relied on her own recollection of events, which took place more than seven months before. OPR found that although several statements in the declaration were inaccurate, at least one was preceded by the qualification that it was based on the attorney's recollection. With respect to one of the inaccurate representations, the DOJ attorney's co-counsel's testimony at a hearing on the matter was consistent with the DOJ attorney's recollection. OPR found that the DOJ attorney's inaccurate statements likely were the result of an innocent misrecollection. OPR concluded that further investigation was unlikely to lead to a misconduct finding and therefore referred the matter to the DOJ attorney's component to address in a management context.

*Improper Reference to Inadmissible Evidence.* A court of appeals criticized a DOJ attorney for presenting evidence in a criminal trial that implied to the jury that the defendant had a prior conviction. The DOJ attorney played a recording to the jury in which the defendant's co-conspirator remarked that the defendant had spent time in jail for a similar offense. Defense counsel moved for a mistrial claiming that he had never heard the recording before trial. The district court denied the motion and did not issue a curative instruction. The court of appeals found that the introduction of this evidence was a serious error but did not find that it violated the defendant's due process rights.

OPR initiated an inquiry. The DOJ attorney told OPR that she had provided the recording at issue to the defense and gave notice before trial of her intent to introduce the recording at trial. When the trial began, the DOJ attorney introduced 37 disks containing audio and video recordings, including the conversation at issue, without objection. The DOJ attorney explained that she presented the recording at issue to demonstrate the defendant's intent and to rebut an entrapment defense, not for the purpose of highlighting the defendant's criminal history.

Based on its review of the evidence, OPR found that the DOJ attorney provided the recording at issue to the defense before trial, and defense counsel did not object when the DOJ attorney introduced the recording at trial. Thus, OPR found insufficient evidence that the DOJ attorney improperly withheld evidence from the defense or obstructed the defendant's access to evidence. Although it was a close question, OPR found that the statement at issue did not fall clearly within the scope of Federal Rule of Evidence 404(b), which requires specific pretrial notice before a prosecutor can introduce such evidence. Because the evidence was inherently prejudicial in nature, however, OPR noted that the better practice would have been to bring the issue to the court's attention through a motion *in limine* and obtain a ruling on its admissibility before trial. OPR concluded that further investigation was unlikely to lead to a misconduct finding, and therefore referred the matter to the DOJ attorney's component to address in a management context.

*Breach of Plea Agreement.* An appellate court criticized a Department attorney for not honoring the terms of a plea agreement. OPR conducted an inquiry and determined that the defendant's plea agreement provided that at sentencing, the government would recommend that the defendant receive a two-level downward adjustment for acceptance of responsibility, provided that no adverse information was received suggesting that such a recommendation would be unwarranted. The plea agreement also required the defendant to assist the United States in recovering the proceeds of her crime. After the defendant pleaded guilty, the U. S. Probation Officer assigned to the case issued a recommendation that the defendant be denied the two-level adjustment for acceptance of responsibility, in part because she failed to assist

the United States in recovering the proceeds of her crimes, as required by the plea agreement.

At sentencing, the defense attorney argued that the defendant was nonetheless entitled to an adjustment for acceptance of responsibility. The district judge found that the defendant had not complied with her obligations under the plea agreement and was thus not entitled to a downward adjustment for acceptance of responsibility. The defendant then obtained new counsel, who appealed the sentence, claiming that the government had breached the plea agreement. On appeal, the government argued that the two-level adjustment recommendation was conditional, and that the defendant had not fulfilled the conditions required for that recommendation.

The appellate court found that the government's failure to recommend a two-level decrease for acceptance of responsibility, absent new information, constituted a breach of the agreement. The panel did not address the defendant's failure to comply with the requirement to provide information regarding the proceeds of the crime subsequent to the execution of the plea agreement. OPR found that the DOJ attorney's position at sentencing was not objectively unreasonable and, therefore, did not constitute professional misconduct. Rather, the DOJ attorney in good faith believed that because the defendant did not fulfill her obligations under the plea agreement, the government was free not to recommend a sentencing adjustment for acceptance of responsibility. Based on the results of its inquiry, OPR closed this matter because further investigation was not likely to result in a professional misconduct finding. OPR referred the matter to the DOJ attorney's component to address in a management context.

### **Summaries for Investigations Closed in Fiscal Year 2013**

The following are examples of investigations OPR closed during Fiscal Year 2013.

*Failure to Comply with DOJ Rules and Regulations; Abuse of Grand Jury or Indictment Process; Failure to Disclose Exculpatory Evidence; Failure to Disclose Impeachment Evidence; Failure to Disclose Witness Statement Evidence, Failure to Keep the Client Reasonably Informed; Candor to the Court; Failure to Competently and Diligently Represent the Interests of the Client.*

A DOJ attorney referred to OPR allegations that she failed to disclose exculpatory information in a criminal case. OPR conducted an investigation and later expanded its investigation in two material respects. First, OPR also considered the DOJ attorney's prosecution of two companion cases arising from the same law enforcement investigation. Second, OPR considered not only the manner in which the DOJ attorney discharged her duty to provide

exculpatory evidence to the defense, but several additional aspects of her conduct in the prosecution of the three cases.

Based on the results of its investigation, OPR concluded that the DOJ attorney violated multiple obligations under the United States Constitution, federal statute and case law, DOJ policy, and state bar rules.

First, with respect to the DOJ attorney's duty to ensure that charges were supported by probable cause and that admissible evidence would be sufficient to obtain and sustain a conviction, OPR found that the DOJ attorney knowingly sought an indictment with a felony drug conspiracy count for which there was insufficient admissible evidence to obtain and sustain a conviction against all charged co-conspirators.

Second, OPR found that the DOJ attorney's grand jury presentations in the three cases were deficient and that, in many respects, she violated the standards for proper grand jury presentation, in reckless disregard of DOJ policies. Most seriously, OPR found that the DOJ attorney, in her grand jury presentation for the superseding indictment, failed to present substantial evidence that negated the guilt of one or more defendants, including evidence from a reliable cooperating co-defendant that undermined the main conspiracy count. The DOJ attorney also failed to present to the grand jury substantial credible evidence undermining the main confidential informant's credibility, including multiple instances in which the informant had misidentified various defendants.

Third, in the two cases that proceeded to trial, OPR found that the DOJ attorney failed to disclose a significant amount of exculpatory information, in intentional violation of her constitutional obligations as well as her obligations under state bar rules. Such evidence included (among other things): law enforcement surveillance evidence indicating that persons other than the charged defendants were responsible for specific drug deals; evidence from cooperating co-defendants indicating that the purported head of the drug-trafficking conspiracy was not their supply source; and evidence from multiple cooperators indicating that co-defendants were misidentified in various drug deals.

Fourth, in the two cases that proceeded to trial, OPR found that the DOJ attorney failed to disclose to the defense substantial evidence impeaching the confidential informant's credibility, in intentional violation of her constitutional and ethical obligations. Such evidence included (among other things) numerous corroborated and credible allegations of the informant's ongoing criminal conduct while working with law enforcement, as well as multiple corroborated instances in which the informant had misidentified various charged defendants.

Fifth, in one of the cases that proceeded to trial, OPR found that the DOJ attorney systematically failed to disclose witness statements to the defense, in reckless disregard of her obligations under the Jencks Act, 18 U.S.C. § 3500, Fed. R. Crim. P. 26.2, and state bar rules. Such witness statements included the grand jury testimony of an important trial witness and numerous law enforcement reports, authored by trial witnesses and bearing their signatures, regarding charged drug transactions of which the witnesses had personal knowledge.

Sixth, OPR found that the DOJ attorney intentionally provided sometimes false and, more often, misleadingly incomplete information to her office's management on multiple occasions, in violation of DOJ policy and state bar rules. In multiple memoranda to her supervisors, the DOJ attorney omitted any mention that purportedly truthful cooperators were providing exculpatory evidence regarding co-defendants, as well as evidence that the main confidential informant was engaged in ongoing felony activity. Some of the DOJ attorney's memoranda to her supervisors contained affirmative misrepresentations.

Seventh, OPR found that the DOJ attorney engaged in professional misconduct by intentionally disregarding her duty of candor to the court, in violation of state bar rules. In one instance, the DOJ attorney misled the court during a sentencing hearing by arguing, contrary to the weight of credible evidence, that a defendant was the sole supplier of the drug trafficking conspiracy.

Eighth, OPR found that the DOJ attorney's conduct, taken as a whole, amounted to a wholesale failure of her duty to represent her client, the United States, diligently and competently, in violation of state bar rules. The DOJ attorney brought serious felony charges against a large number of citizens based on a cursory investigation and review of supporting evidence. Her grand jury practice was careless and sloppy. She failed to scrupulously document and disclose a large quantity of exculpatory and impeachment evidence. She systematically failed in her duty to disclose witness statement evidence. Her memoranda to her supervisors were frequently incomplete and materially misleading. Finally, her various representations to the court, both orally and in writing, reflected a lack of diligence in ascertaining and truthfully communicating facts.

The DOJ attorney retired after reviewing and commenting upon OPR's draft report. Thereafter, OPR referred its final report to the PRMU, which determined that OPR's findings and conclusions were accurate, complete, and supported by the evidence. At the direction of the PMRU, OPR referred its findings to appropriate state bar disciplinary authorities.

*Improper Closing Argument.* A court of appeals overturned the defendant's convictions for insufficiency of evidence. In its opinion, the court harshly criticized the prosecuting DOJ attorney for her comments in rebuttal argument suggesting that, if acquitted, the defendant would be allowed to keep the ill-gotten gains from a fraud scheme. The court of appeals noted that, by the time of trial, the defendant had accepted personal liability for the balance owed to the victim, had negotiated a repayment plan with the bank, and had already repaid a significant portion of the debt. The court further noted that the DOJ attorney herself had successfully moved *in limine* to exclude as irrelevant all evidence and arguments regarding the defendant's efforts toward repayment. OPR conducted an investigation.

Based on its investigation, OPR concluded that the DOJ attorney committed professional misconduct by making an improper, misleading, and unfairly prejudicial reference in her rebuttal argument to a fact not in evidence -- that the defendant would be relieved of her obligation to repay the debt if acquitted -- in reckless disregard of her obligations under applicable state bar rules and case law. The DOJ attorney asserted to OPR (among other things) that her rebuttal was an "invited response" to the defense attorney's inflammatory closing argument. OPR concluded, however, that the DOJ attorney's rebuttal argument was not logically or rhetorically responsive to the defense closing argument. As the DOJ attorney was aware, the defendant was legally liable for repayment regardless of the verdict and had in fact made a significant payment on the balance. OPR concluded that the rebuttal argument constituted professional misconduct under the circumstances.

The DOJ attorney retired prior to OPR issuing its final report. OPR referred its findings to the PRMU, which upheld OPR's findings. OPR referred the matter to the appropriate state bar disciplinary authorities.

*Failure to Disclose Exculpatory Evidence.* A district court criticized a DOJ attorney for failing to disclose to the defense prior to trial a statement of a co-defendant which purported to exculpate the lead defendant in a drug prosecution. The court declared a mistrial when the government belatedly disclosed the statement to the defense after the trial had commenced. The DOJ attorney self-reported the court's criticism to OPR, and OPR conducted an investigation into the untimely disclosure of the statement.

During a period of protracted pretrial litigation, law enforcement agents briefly interviewed the co-defendant (then an uncharged target) when he appeared at their offices pursuant to a subpoena to provide handwriting exemplars and fingerprints. During the interview, the co-defendant said that the lead defendant was not present at a location where a large quantity of drugs was found, a statement which the agents knew to be false. The interview was quickly terminated, and one of the agents wrote a one-page memorandum summarizing the interview. The agent contemporaneously told the DOJ

attorney what the co-defendant said, but did not provide the interview memorandum to the DOJ attorney. Subsequently, the DOJ attorney forgot about the co-defendant's statement and did not disclose it to the defense.

At trial, after the first day of testimony, the DOJ attorney discovered the memorandum of the co-defendant's interview in the agent's file, and she immediately provided it to the defense. The district court, however, declared a mistrial the following day based on the DOJ attorney's failure to provide the information in a timely manner.

Based upon its investigation, OPR concluded that the DOJ attorney did not violate *Brady* principles, the Federal Rules of Criminal Procedure, or state bar rules by her late disclosure of the statement, which she disclosed immediately upon finding it and in time for the defense to make effective use of it at trial. OPR concluded, however, that the DOJ attorney committed professional misconduct by acting in reckless disregard of her obligations under multiple DOJ discovery policies regarding the pretrial review of investigative agency files -- policies designed to avoid the discovery lapse that led to the mistrial.

OPR referred its findings to the PRMU, which upheld OPR's findings and conclusions and directed that a formal letter of reprimand be issued to the DOJ attorney.

*Compliance with Crime Victims' Rights Act; Candor to the Court.* The DOJ's Victims' Rights Ombudsman referred to OPR a complaint from the family of a homicide victim alleging that a DOJ attorney failed to notify the victim's family of the terms of a plea agreement that she had negotiated with the defendant's attorney, and also failed to inform the family of the court date on which the guilty plea would be entered. OPR conducted an investigation and also considered the related issue of whether the DOJ attorney misled the court during the change of plea hearing to believe that the DOJ attorney had in fact informed the victim's family of the change of plea hearing.

The underlying case involved a domestic homicide. Although the victim's family felt strongly that it was a first-degree murder case, the DOJ attorney reasonably perceived that a viable self-defense claim would be presented. As the trial date approached, the DOJ attorney and the defense agreed to a disposition in which the defendant would plead guilty to manslaughter and serve no more than eight years in prison. The DOJ attorney did not inform the victim's family that a plea agreement had been reached and that a change of plea hearing had been scheduled. At the hearing, the judge asked the DOJ attorney if the family had asked to be heard at the hearing, and the DOJ attorney replied in the negative, failing to inform the judge that the victim's family was in fact unaware of the hearing.

OPR concluded that the DOJ attorney committed intentional professional misconduct in connection with the plea agreement and change of plea hearing by: (1) knowingly failing to inform the homicide victim's family that she was engaged in plea negotiations with the defense attorney, that an agreement had been reached, and that a change of plea hearing had been scheduled, in violation of her obligations under the Crime Victims' Rights Act and DOJ policy; and (2) knowingly misleading the court during the change of plea hearing to believe that she had informed the homicide victim's family of the change of plea hearing and that the family consciously declined to attend, in violation of bar rules and her general duty of candor to the court.

OPR referred its findings to the PRMU, which upheld OPR's findings, imposed a 5-day suspension, and directed that the matter be referred to appropriate bar disciplinary authorities.

*Failure to Maintain Active Membership in a State Bar; Failure to Accurately Certify Bar Membership Status; Unauthorized Practice of Law; Misrepresentation.* OPR was informed that a DOJ attorney may have engaged in professional misconduct by becoming a delinquent member of her state bar who was not authorized to practice law. Upon receiving this information, the attorney's supervisor confirmed with bar authorities that the attorney had been suspended from the active practice of law as a result of the attorney's failure to complete continuing legal education (CLE) requirements. The supervisor also confirmed that the DOJ attorney signed a DOJ Attorney's Bar Re-Certification Form certifying that she was a member in good standing of her state bar who was authorized to practice law, when at the time, she was not.

Upon being notified by her supervisor of the problem, the DOJ attorney later completed and reported the required CLE credit hours to her state bar. The DOJ attorney was reinstated as a member in good standing of her state bar who was authorized to practice law.

OPR conducted an investigation and found that the DOJ attorney knew and understood her state bar's CLE requirement and the CLE reporting deadline. OPR also found that the DOJ attorney received e-mail reminders from her state bar, both before and after the CLE reporting deadline, as well as a certified letter from her state bar, reminding her of the CLE requirement. The DOJ attorney nonetheless failed to timely complete and report the required number of CLE credit hours. Finally, OPR found that the DOJ attorney made misrepresentations to her state bar in a petition for removal of delinquency in connection with her reinstatement to membership in good standing.

Accordingly, OPR concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of her obligation, pursuant to statute and DOJ policy, to at all times be authorized to practice law by maintaining an active membership in at least one state bar. During the

time of her lapse in bar membership, the DOJ attorney was a delinquent member of her state bar who was not authorized to practice law. OPR also concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of her obligation to accurately certify her bar membership status to the DOJ. OPR further concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of her obligation to comply with her state bar's rules of professional conduct prohibiting the unauthorized practice of law and misrepresentation.

The DOJ attorney left the Department prior to the implementation of discipline, but OPR reported the misconduct to the appropriate bar disciplinary authorities.

*Failure to Object to Courtroom Closure in Violation of Federal Regulation; Misrepresentation to the Client.* Upon reviewing a transcript of a district court sentencing hearing, supervisory DOJ attorneys learned that a DOJ attorney representing the government at a hearing apparently failed, in violation of 28 C.F.R. § 50.9, to object to a defense request to close the courtroom to the public. The supervisory attorneys directed the DOJ attorney to file an application with DOJ's Office of Enforcement Operations (OEO) seeking permission to file a motion for courtroom closure *nunc pro tunc*. In the application, the DOJ attorney represented that she had attempted to object to the closure of the courtroom even though there was no record in the hearing transcript that she had attempted to do so.

OPR conducted an investigation and concluded that the DOJ attorney violated 28 C.F.R. § 50.9 by failing to object to closing the courtroom, but that under the circumstances of this case, the violation did not constitute professional misconduct or an exercise of poor judgment. OPR concluded, however, that the DOJ attorney engaged in intentional professional misconduct in violation of state bar rules by misrepresenting in her OEO application and in her communications with her supervisors that she had attempted to object to the closure of the courtroom.

Before OPR completed its investigation in this matter, the DOJ attorney resigned from the Department. The matter was referred to the appropriate bar disciplinary authorities.

*Misrepresentations to the Court.* During the trial in a criminal case, the district court struck the testimony of the government's expert witness, finding that during pretrial proceedings, the government made misrepresentations to the court regarding the expert and the manner in which the expert would conduct a pretrial examination.

Before trial, the parties litigated the process by which they would develop and present expert testimony at trial. After the court issued a ruling on the

evidence to be introduced at trial, the government filed an *ex parte* motion seeking a modification of the court's order. The court granted the government's motion and ordered the motion and the order to be sealed. At trial, when the motion and the order were unsealed, the defense moved to exclude the testimony of the government's expert witness, claiming the prosecutor misrepresented the methodology to be used in conducting the examination. After a hearing, the court ruled that the government's *ex parte* motion violated the defendant's due process rights because the government misled the court about the methodology to be used by the government's expert witness. As a sanction, the court struck the testimony of the government's expert witness.

Based on the results of its investigation, OPR determined that the government did not intend to prevent the defense from challenging the government's expert witness or the methodology to be used in conducting the examination, and that the DOJ attorney responsible for developing and presenting the government's evidence had erroneously described in the government's *ex parte* motion how the expert intended to conduct the examination. OPR concluded that the attorney did not engage in prosecutorial misconduct or exercise poor judgment.

*Failure to Comply with Plea Agreement Policies; Failure to Comply with Policies Regarding Immunity or Non-Prosecution Agreement.* A court of appeals found that during a sentencing hearing, a DOJ attorney breached the plea agreement with the defendant in two respects. First, the government used information from an interview of the defendant that the government had agreed it would not use; and second, the government argued for a sentence higher than the plea agreement permitted. The court vacated the defendant's sentence and remanded the case for resentencing.

Based on the results of its investigation, OPR determined that as to the first basis, the DOJ attorney engaged in professional misconduct by acting in reckless disregard of her obligation not to disclose information obtained from the defendant during an interview when the government had agreed it would not use such information. As to the second basis, OPR concluded that the DOJ attorney did not engage in misconduct or exercise poor judgment in her sentencing request. Rather than intending to ask for a higher sentence in violation of the plea agreement, the DOJ attorney was attempting to rebut what she perceived to be improper arguments by defense counsel. Accordingly, OPR concluded that her argument criticized by the court was the product of a mistake, and that instead of immediately making the argument, she first should have raised the issue of defense counsel's improper arguments with the court.

OPR referred its findings to the PRMU; the DOJ attorney received an informal letter of admonishment.

*Failure to Comply with Federal Law; Failure to Comply with Federal Rules of Criminal Procedure.* A DOJ attorney failed to comply with the statute requiring that immediately upon the expiration of a wiretap order, the government make the wiretap evidence available to the court for sealing. In another unrelated case, the DOJ attorney failed to respond to a defendant's motion for judgment of acquittal, in violation of the district court's local rules.

OPR conducted an investigation. With regard to the DOJ attorney's failure to comply with the statutory sealing requirement, OPR found that the DOJ attorney did not apply for a sealing order until nine calendar days after the district court's wiretap order had expired. The DOJ attorney offered numerous excuses for the delay in obtaining the sealing order, and OPR carefully examined her explanations, concluding that she did not fully appreciate the statutory sealing requirement and that she failed to take adequate steps to ensure that she complied with it. OPR found that the judge who signed the wiretap order was unavailable for three of the nine days that elapsed after the wiretap order expired; that there was no substitute judge available to sign the sealing order; and that the DOJ attorney was on leave for three of the nine days that elapsed after the order expired. However, the trial judge who signed the wiretap order was available immediately upon the expiration of the order, and the DOJ attorney took no action to obtain a sealing order because she was unaware that the wiretap order had expired. OPR concluded that the DOJ attorney's conduct was in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take and that she exercised poor judgment in failing to make the wiretap evidence available for sealing immediately upon the expiration of the wiretap order.

With regard to the DOJ attorney's failure to respond to the defendant's motion for judgment of acquittal in another unrelated case, OPR found that she intended to oppose the defendant's motion but was unaware that the local rules required her to respond to the motion within 14 days and that the local rules permitted the court to deem the defendant's motion conceded in the event the government failed to file a timely response. OPR determined that the DOJ attorney's failure to know and abide by the local rule resulted in the court's ruling on the defendant's motion without the benefit of a response from the government. Although the court could have treated the defendant's motion as conceded, it addressed and resolved the defendant's motion on the merits and reduced the defendant's felony conviction to a misdemeanor. OPR concluded that the DOJ attorney's failure to file a timely opposition impaired the government's litigation position and that she acted in reckless disregard of her obligation to comply with the local court rules.

Because the DOJ attorney resigned from the Department while the OPR investigation was ongoing, the Department took no disciplinary action against the former DOJ attorney.

*Whistleblower - Retaliation for Protected Disclosure.* A DOJ employee (employee) alleged that a DOJ attorney retaliated against the employee for having previously complained to OPR about the DOJ attorney. OPR opened an inquiry, which was subsequently converted to an investigation.

Based on its investigation, OPR concluded that, although the employee's prior protected disclosures to OPR about the DOJ attorney were a contributing factor in the DOJ attorney's referral of the employee for an alleged conflict of interest, there was clear and convincing evidence that the resulting action against the employee would have occurred even in the absence of the protected disclosures by the employee. OPR also concluded, however, that the employee's protected disclosures to OPR were a contributing factor in the DOJ attorney's recommendation that the employee be transferred from her managerial position. Given the DOJ attorney's motive to retaliate; the close proximity in time between the conclusion of OPR's investigation of the DOJ attorney and her recommendation that the employee be transferred from a managerial position; the lack of allegations of recent wrongdoing by the employee; and the lack of evidence that the DOJ attorney would make such a recommendation against a similarly-situated employee who was not a whistleblower, OPR did not find clear and convincing evidence that the DOJ attorney would have taken the same personnel action in the absence of the employee's protected disclosures.

Accordingly, OPR concluded that the DOJ attorney retaliated against the employee for a protected disclosure and referred this matter to the Director of the Office of Attorney Recruitment and Management to order whatever corrective action, if any, he deems appropriate.

*Failure to Keep the Client Reasonably Informed; Failure to Abide by the Client's Decisions.* OPR learned of allegations that, in two related criminal cases, a DOJ attorney, contrary to her supervisors' instructions: (1) argued that a provision of the U.S. Sentencing Guidelines (USSG) was not applicable to the calculation of the defendant's sentence; and (2) made certain sentencing arguments and argued in favor of probation for a defendant. OPR conducted an investigation.

With respect to the allegation that the DOJ attorney disregarded her supervisors' instruction to argue in favor of the application of the USSG provision, OPR concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of the rules of professional conduct that obligate an attorney to inform the client about all circumstances that may affect the client's ability to make an informed decision. OPR found that the DOJ attorney failed to inform her supervisors that their instruction might violate the existing plea agreement. During e-mail exchanges and meetings with supervisors prior to the sentencing hearing, the DOJ attorney neither communicated her concern that the instruction violated the plea agreement,

nor during the decision making process did she provide her supervisors with enough information to allow them to make a determination about the impact of their instruction on the plea agreement. As a consequence of the DOJ attorney's failure to communicate effectively with her client, the DOJ supervisors lacked sufficient information to make an informed decision, and were not able to consider available alternatives, including fashioning an argument that protected the United States' interests in the uniform application of the USSG, while complying with the terms of the plea agreement.

OPR also considered the allegation that contrary to her supervisors' instruction, the DOJ attorney made certain sentencing arguments and argued in favor of probation for a defendant. While the DOJ attorney had discussed with supervisors the possibility of supporting a sentence of probation for this defendant, that request was denied, and the supervisors expected the DOJ attorney to argue for a sentence within the USSG range, and avoid raising certain arguments. After the sentencing hearing, in response to a supervisor's question, the DOJ attorney did not reveal that she had argued in favor of probation. OPR did not find the DOJ attorney's multiple and conflicting explanations supporting her decision to argue in favor of probation to be credible. As a consequence, OPR concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of her obligation to abide by a client's decisions concerning the means by which the client's objectives are to be achieved.

Because the DOJ attorney resigned from the Department, no discipline was imposed in this matter. At the direction of the PMRU, OPR notified the appropriate state bar authorities of its findings of professional misconduct.

*Failure to Maintain Active Bar Membership; Lack of Candor to OPR.* A DOJ attorney reported to OPR that she had been suspended from her state bar for failure to pay her annual bar dues. The DOJ attorney suggested that she recently learned that she was suspended for failing to pay her current state bar dues and stated that the problem arose because of a faulty address in the state bar's records. Upon receiving this information, OPR contacted the bar and learned that the DOJ attorney had not maintained an active bar membership for an extended period of time.

OPR conducted an investigation and concluded that the DOJ attorney committed intentional professional misconduct when she knowingly failed to maintain an active bar membership in at least one state bar, in violation of her statutory and Department obligations; knowingly certified that she was an active member of her state bar when she was not, in violation of the Department's bar certification requirement; and knowingly engaged in the unauthorized practice of law. OPR also concluded that the DOJ attorney committed intentional professional misconduct when she purposefully misrepresented to OPR, her DOJ component, and the Professional

Responsibility Advisory Office that her state bar membership had been suspended for a brief period of time, when in fact she had been suspended for a far longer period of time.

OPR recommended that the DOJ attorney be terminated from her employment with the Department, and she retired during the disciplinary process. OPR notified the appropriate state bar authorities of its findings of professional misconduct.

*Whistleblower - Retaliation for Protected Disclosure.* An FBI employee alleged that she suffered retaliation for making a protected disclosure concerning a supervisor's alleged violation of federal administrative rules and regulations. OPR conducted an investigation and found that the FBI employee had made a protected disclosure within the meaning of the FBI whistleblower regulations.

OPR determined based on its investigation, however, that there was no reasonable basis to conclude that the FBI employee suffered retaliation for engaging in protected whistleblowing activity. OPR based its finding on the facts that the personnel actions about which the FBI employee complained were too remote in time after the protected disclosure; were supported by stated agency justifications that were reasonable and based upon conduct by the employee that occurred independent of and remote in time from her protected disclosure; and were based on the needs of the FBI and not out of a motive to retaliate against her for her protected disclosure. Further, OPR found that the FBI demonstrated by clear and convincing evidence that it would have taken the same personnel actions in the absence of the protected disclosure. Moreover, OPR found that no FBI supervisor with knowledge of the protected disclosure harbored a retaliatory motive against the FBI employee. Therefore, OPR concluded that a reasonable person would not conclude that the employee's disclosure was a contributing factor in the personnel actions. OPR informed the FBI employee of OPR's decision.

*Lack of Candor; Misrepresentation/Misleading the Court; Violation of DOJ Policy.* A DOJ attorney self-reported to OPR that she lied to a magistrate judge's secretary when submitting an application for a warrant to the magistrate judge for approval. In response to a question by the magistrate judge's secretary, the DOJ attorney identified two supervisors who, according to the DOJ attorney, had reviewed and approved the application. After the magistrate judge's secretary contacted one of the supervisors, the DOJ attorney acknowledged in an e-mail addressed to both supervisors that she had lied to the magistrate's secretary when she stated that a supervisor had reviewed the warrant.

Based upon its investigation, OPR concluded that the DOJ attorney engaged in intentional professional misconduct by violating her duty of candor

to the court and by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. During its investigation, OPR determined that the DOJ attorney was aware that, at the magistrate judge's direction, the secretary routinely conducted a preliminary review of all pleadings filed in cases assigned to the magistrate judge to ensure that the pleadings conformed to the magistrate judge's requirements. The DOJ attorney also admitted that when she falsely identified the supervisors who had reviewed the warrant, she named supervisors whom she believed the secretary liked and respected because the DOJ attorney believed that using those names would make it more likely that the magistrate judge would sign the warrant.

During OPR's investigation, the DOJ attorney admitted that she knew that applying for the warrant without first obtaining supervisory approval violated a supervisory review policy to which she was subject. Accordingly, OPR also concluded that the DOJ attorney engaged in intentional professional misconduct by violating the policy requiring her to submit all pleadings for supervisory review prior to filing them with the court.

OPR referred its findings to the PMRU; the DOJ attorney received a 14-day suspension. At the direction of the PMRU, OPR notified the appropriate state bar authorities of its finding of professional misconduct.

*Ex parte communications.* OPR received a complaint alleging that prior to a law enforcement action involving the arrests of hundreds of individuals, DOJ attorneys engaged in improper *ex parte* pretrial contacts with the district court concerning substantive legal issues relating to the law enforcement action and that those *ex parte* contacts adversely impacted a subsequent criminal trial. No official record or transcript of the contacts with the court was created. In support of these allegations, the complainant cited several e-mails that were released pursuant to Freedom of Information Act requests. The complaint also alleged that the DOJ attorneys violated Supreme Court precedent with respect to charging issues.

OPR's investigation revealed that while the court was involved in logistical planning for the expected large-scale law enforcement action, the district court was not informed of the identity of the targets, nor did the district court make any decisions concerning whom to charge, what charges to bring, and whether plea agreements should be offered. OPR found that given the limited nature of the available judicial resources, it was unrealistic to expect that a law enforcement action involving the possible detention of a large number of persons could have been conducted without the court's involvement in the logistical planning. Nor did OPR find any evidence that the individuals who were subsequently criminally charged were the subject of any *ex parte* contacts between the DOJ attorneys and the district court. Accordingly, OPR concluded that under these circumstances, the *ex parte* communications

between the DOJ attorneys and the court were appropriate and that rules of professional conduct did not impose an obligation upon the DOJ attorneys to inform the defendants of the contacts with the court. OPR suggested, however, that in any future planning for large-scale law enforcement actions with the court, the DOJ attorneys should consider involving the defense bar or creating a clear record of contacts with the court.

*Failure to Maintain Active Bar Membership.* A DOJ component informed OPR that a DOJ attorney had not maintained an active bar membership for an extended period of time because she registered only as an “inactive” member of the bar, and that she had repeatedly certified to the Department that she was an active member of a state bar, when she was not. According to the DOJ attorney, she believed that “inactive” was the correct membership category for an attorney in her situation under the rules of her state bar, and that she was in compliance with the Department’s bar membership requirements.

OPR conducted an investigation and found that the DOJ attorney’s belief that she was authorized to practice law while maintaining an inactive bar status, while perhaps genuinely held, was objectively unreasonable. OPR concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of her obligations imposed by Department policy, statute, and bar rules when she failed to be authorized to practice law by maintaining an active bar membership in at least one state bar; repeatedly and inaccurately certified on the Department’s bar certification forms that she was an active member of a state bar; and engaged in the unauthorized practice of law.

Because the DOJ attorney was no longer employed by the Department, OPR made no recommendation regarding discipline and referred the matter to the PMRU to make a determination as to whether bar disciplinary authorities should be notified of OPR’s findings.

*Candor to the Court; Improper Examination of a Witness.* A DOJ attorney was criticized by a court of appeals for failing to explicitly inform the district court that she intended to impeach the defendant at trial with a redacted transcript of the defendant’s guilty plea colloquy. Although the defendant initially pled guilty, she subsequently withdrew the plea on the ground that she had been threatened into committing the crime. Following the withdrawal of the guilty plea, both parties agreed, with the district court’s approval, not to make any reference to the guilty plea during the trial. The DOJ attorney fashioned a question in cross-examination of the defendant attempting to avoid reference to the guilty plea, but the court of appeals determined that the question, as phrased, was false and misleading.

OPR initiated an investigation and found that the evidence was insufficient to conclude that the attorney engaged in professional misconduct. OPR found that, although the attorney should have realized that the

impeachment, as presented, was likely to result in a false impression, the evidence was insufficient to conclude that she actually knew the impression resulting from the impeachment would be false, or that she intended to create such an impression. In addition, OPR found that the attorney did not intentionally mislead the court when the DOJ attorney previewed the question she intended to ask in response to an objection. OPR concluded, however, that the DOJ attorney acted inappropriately and exercised extremely poor judgment by failing to inform the court about the manner and extent of her proposed redaction to impeachment material prior to impeaching the defendant. OPR referred its findings to the component to address in a management context.

*Failure to Comply with Discovery Obligations; Candor to the Court.* A DOJ supervisor notified OPR that, following an evidentiary hearing, a district court found that the government violated its discovery obligations under Rule 16 of the Federal Rules of Criminal Procedure and imposed sanctions against the United States in the form of attorneys' fees and costs.

Although the DOJ attorneys assigned to the case provided discovery following the defendant's arraignment, they overlooked some Rule 16 material that was in the government's possession at the time. In addition, although the attorneys obtained additional Rule 16 material following the defendant's arraignment, they did not promptly disclose it because the court permitted the defendant to leave the jurisdiction to stand trial on other criminal charges and the case therefore was not yet scheduled for trial, and because the court had not issued a scheduling order establishing deadlines for completing discovery.

At a status hearing convened to address an extension of the Speedy Trial Act deadline, the district court, upon learning that the defendant's other case very recently had been dismissed, scheduled a trial date in the case. The DOJ attorneys, however, had not expected the court to set a trial date at that hearing, and when the court inquired about the status of discovery, the prosecutor erroneously informed the court that the government had substantially fulfilled its discovery obligations. Based upon the attorney's erroneous representations, the court scheduled a trial date in the case.

Following the status hearing, the DOJ attorneys belatedly disclosed the Rule 16 material that they had overlooked when they initially provided discovery, as well as the Rule 16 material that the government had obtained following the defendant's arraignment. Based on the lateness of the disclosures, the defense moved for dismissal of the case or sanctions against the government. At an evidentiary hearing, the court found that the government had violated its discovery obligations by failing to provide discovery in a timely manner, and that the attorneys had been negligent in failing to timely discharge their Rule 16 responsibilities. Although the court found that neither of the DOJ attorneys acted in bad faith, the court sanctioned the

United States by awarding the defendant attorneys' fees and costs associated with the discovery litigation.

OPR conducted an investigation and concluded that the DOJ attorneys did not engage in intentional professional misconduct by suppressing, concealing, or knowingly withholding discovery from the defendant. OPR further concluded that the evidence was insufficient to find that the attorneys acted in reckless disregard of their discovery obligations with respect to the untimely disclosures. OPR concluded, however, that the attorneys were negligent and exercised extremely poor judgment in discharging their discovery obligations.

In addition, OPR concluded that the attorney who represented the government at the status hearing did not intentionally mislead the court or recklessly disregard her duty of candor to the court in answering the court's questions regarding discovery at the status hearing. Rather, OPR concluded that the attorney erred at the hearing by underestimating the amount of discovery that had not yet been produced. OPR also concluded that the evidence was insufficient to find that the attorney engaged in professional misconduct by failing to correct her misrepresentations at the hearing once she became aware of her error. Instead, the attorney immediately made efforts to produce the discovery that the defendant had not yet been provided. OPR further concluded, however, that the attorney exercised extremely poor judgment by failing to notify the court of the error immediately once she became aware of it. OPR referred its findings to the DOJ attorneys' component to address in a management context.

*Failure to Comply with Plea Agreement Policies; Failure to Keep Client Informed; Candor to the Court; Misrepresentation.* A DOJ manager notified OPR that a DOJ attorney, acting without the knowledge or approval of her supervisors and in violation of office policy, included language in a plea agreement stipulating that the defendant had provided substantial assistance to the government and was "entitled" to a government motion for a downward departure at sentencing, pursuant to Section 5K1.1 of the U. S. Sentencing Guidelines (USSG). The DOJ manager also raised questions about the DOJ attorney's candor in her communications with her supervisors and the district judge assigned to the case with respect to the government's subsequent failure to honor the plea agreement's commitment to file a motion for a downward departure.

OPR conducted an investigation and found that the DOJ attorney violated a clear and unambiguous office policy by entering into a plea agreement that committed the government to move for a downward departure at sentencing, without obtaining the requisite supervisory approval. OPR found that because the supervisors were unaware of the binding commitment in the plea agreement, they did not authorize the DOJ attorney to move for a

downward departure at sentencing, as the plea agreement required. The DOJ attorney declined to file a downward departure motion and, at the sentencing hearing, attributed the failure to honor the plea agreement to her supervisors. OPR concluded that the attorney engaged in intentional professional misconduct by failing to abide by the directives of her client and by failing to keep her client informed of material facts with respect to the representation. OPR further concluded that the attorney violated her duty of candor to the court when she failed to correct the court's erroneous belief that the government knowingly breached the plea agreement by declining to move for the downward departure, even though she knew that her supervisors were unaware that the plea agreement contained a binding promise to file such a motion. OPR concluded that the DOJ attorney's failure to correct the court's misunderstanding constituted intentional professional misconduct.

Finally, OPR found that the DOJ attorney, between the entry of the guilty plea and the sentencing in the case, repeatedly misled her supervisors by not informing them that she had inserted language in the plea agreement that committed the government to move for a downward departure at sentencing. As a result, the government's decision to not file a downward departure motion made it appear to the court that the government had knowingly reneged on its commitment. OPR concluded that the DOJ attorney's course of conduct in the case -- from agreeing to move for a downward departure without authorization, to leading the court to believe that the government had knowingly breached the plea agreement's commitment to so move -- constituted dishonest and deceitful conduct. Accordingly, OPR concluded that the DOJ attorney committed intentional professional misconduct in her handling of the case.

OPR referred its findings to the PMRU, which upheld OPR's findings and imposed a 20-day suspension. While the suspension was on appeal to the Merit Systems Protection Board, the penalty was mitigated to a 12-day suspension by agreement of the parties. OPR referred its findings to the appropriate state bar disciplinary authority.

*Failure to Disclose Exculpatory Evidence; Failure to Comply with United States Attorneys' Manual Provision.* After a defense attorney filed a complaint alleging that documents relevant to two criminal cases were not disclosed by the prosecution, the DOJ attorneys handling the case conducted a review and released hundreds of pages of documents to defense attorneys that should have been, but were not, disclosed to the defense prior to trial. An appeals court ultimately vacated the defendants' convictions, finding that the prosecutors violated their obligations with regard to the disclosure of exculpatory evidence.

OPR conducted an investigation and concluded that the government violated its duty with regard to the disclosure of exculpatory evidence under *Brady* and *Giglio*, the applicable rules of professional conduct, and Department

policy by failing to disclose to the defense information in its possession. OPR concluded, however, that the DOJ attorneys did not commit professional misconduct or exercise poor judgment because they had relied on representations made by a colleague (who was no longer employed with the DOJ) that she had been assured by a responsible DOJ official that disclosure of the information was not required. OPR also concluded that the DOJ attorneys were unaware that their colleague received such assurance based upon her providing incomplete and misleading information to the DOJ official.

OPR also concluded that the government violated its duty with regard to the disclosure of exculpatory evidence under *Brady* and *Giglio*, applicable rules of professional conduct, and Department policy by failing to disclose to the defense the exculpatory statement of a government witness contained in a DOJ attorney's witness interview notes. OPR concluded that the other DOJ attorney members of the prosecution team were unaware of the statement and thus not responsible for the failure to disclose it. OPR concluded that the junior DOJ attorney who authored the notes made a mistake in not bringing the notes to the attention of the senior attorneys on the case.

Finally, OPR concluded that the government did not violate its obligations concerning the remaining undisclosed, allegedly inconsistent statements identified by the court because the statements either were not favorable to the defense, or were merely cumulative of other impeachment evidence possessed by the defense and therefore were not material. OPR was unable to conclude by a preponderance of the evidence that the government breached its duty to disclose such statements under applicable rules of professional conduct and DOJ policy because, at the time of the trial, the interpretation and enforcement of such rules were not sufficiently clear and unambiguous to mandate disclosure beyond the requirements of established *Brady* and *Giglio* principles. OPR's findings were referred to the DOJ attorneys' components to address in a management context.

*Conflict of Interest; Appearance of Conflict of Interest; Failure to Competently Represent the United States.* OPR received allegations from a Department component that a DOJ attorney appeared to be making litigation decisions favorable to defendants whose attorneys had donated money to a charitable fund established for the benefit of the DOJ attorney's family member. OPR determined that the DOJ attorney created a charitable fund and received donations from numerous members of the legal community, including several of the lawyers who represented the defendants, as well as witnesses and targets of the investigation. The DOJ attorney claimed that a law firm managed the fund and that she was unaware of the identity of the fund donors.

Based on the results of its investigation, OPR found insufficient evidence to conclude by a preponderance of the evidence that the DOJ attorney violated DOJ regulations governing conflicts of interest, the appearance of a conflict of

interest, or local rules of professional conduct, by participating in a matter in which defendants, targets or witnesses were represented by defense attorneys who had contributed, or provided other forms of assistance, to the charitable fund. OPR concluded, however, that the DOJ attorney exercised extremely poor judgment by failing to promptly disclose to the component head and DOJ ethics officials the existence of the charitable fund and the fact that defense attorneys who ultimately represented targets or witnesses in the matter had contributed to it.

OPR further concluded that the DOJ attorney did not violate the applicable rules of professional conduct by failing to properly communicate with DOJ colleagues working on the matter. OPR concluded, however, that the DOJ attorney exercised extremely poor judgment by failing to disclose the source of information set forth in a chart upon which the DOJ attorney relied when citing settlement statistics during a meeting with the prosecution team.

In addition, OPR could not find by a preponderance of the evidence that the DOJ attorney violated clear and unambiguous standards of conduct applicable to government employees by failing to seek appropriate approval before soliciting and accepting donations and assistance from the local defense bar. OPR concluded, however, that the DOJ attorney's conduct in this regard constituted extremely poor judgment.

Finally, OPR concluded that the DOJ attorney did not commit professional misconduct in violation of Department regulations by misusing her title or position for personal gain. OPR concluded, however, that the DOJ attorney exercised extremely poor judgment when advocating for the fund and by failing to clarify that her views did not represent those of the United States or the Department of Justice. OPR's poor judgment findings were referred to the component to address in a management context.

*Failure to Comply with Plea Agreement Policies; Failure to Comply with Sentencing Regulations.* The government confessed error following a sentencing hearing at which, after the court excluded the defendant's prior conviction and lowered the applicable U.S. Sentencing Guidelines range, the DOJ attorney allegedly breached the plea agreement by failing to revise the government's sentencing recommendation to comply with the terms of the plea agreement. In particular, the DOJ attorney failed to expressly recommend a mid-range Guidelines sentence, failed to correct the court's incorrect statement that the government had recommended a longer sentence, and responded to defense counsel's mischaracterization of the underlying criminal offense by referencing aggravating facts.

OPR conducted an investigation and found that the DOJ attorney should have affirmatively recommended a mid-range Guidelines sentence and clarified the court's misstatement that the government had requested a longer sentence.

Nevertheless, the DOJ attorney's impression that the court was aware of the government's sentencing position was not unreasonable given: (1) the DOJ attorney's statements to the court concerning the government's obligation to recommend a mid-range sentence; (2) the DOJ attorney's statement to the court during the sentencing hearing that the court's prior conviction ruling could not support the base offense level upon which the government based its higher sentencing recommendation; (3) the government's obligations contained in the plea agreement, presentence report, and the government's sentencing memorandum, all of which the court possessed; (4) the DOJ attorney's statement at the sentencing hearing that the government was bound by the plea agreement; and (5) the defense counsel's comment that the prosecution was "hampered" by the defense request, which lowered the applicable Guidelines range.

Based upon the results of its investigation, OPR concluded that the DOJ attorney made a mistake at sentencing when she failed to explicitly recommend a mid-range Guidelines sentence and clarify the court's statement that the government had recommended a longer sentence. OPR also concluded that the DOJ attorney made a mistake by referencing aggravating facts in rebuttal of the defense counsel's mischaracterization of the underlying criminal offense, and that the DOJ attorney should have been clearer regarding her intent when attempting to clarify the factual record. OPR's mistake findings were referred to the component to address in a management context.

*Failure to Diligently Represent the Interests of the Client; Failure to Competently Represent the Interests of the Client.* A DOJ attorney reported to OPR that she allowed the statute of limitations to expire in a mail and wire fraud case, resulting in viable criminal charges being time-barred from prosecution. OPR initiated an investigation and learned that the DOJ attorney allowed the five-year statute of limitations, applicable to mail and wire fraud offenses, to expire because the DOJ attorney erroneously believed that the ten-year statute of limitations, relating to financial institution fraud, applied to the conduct under investigation. OPR determined, however, that the DOJ attorney did not conduct any factual inquiry or legal analysis before erroneously relying on the ten-year statute of limitations and allowing the five-year statute of limitations to expire. OPR also determined that the DOJ attorney knew that the five-year statute of limitations was about to expire, yet took no steps to timely prosecute the case.

Based on its investigation, OPR concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of her obligation to competently and diligently represent the Department, and that her conduct represented a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

OPR referred its findings to the PMRU, which upheld OPR's findings and imposed a seven-day suspension. At the direction of the PMRU, OPR notified the appropriate bar disciplinary authorities of OPR's misconduct findings.

*Violation of Federal Rule of Criminal Procedure 6(e).* In a complaint to OPR, a law enforcement agent alleged that a DOJ attorney disclosed confidential case information, including information protected by grand jury secrecy rules, on her personal Facebook page. Specifically, the DOJ attorney stated on her Facebook page that she was traveling to a particular location to gather evidence for a criminal investigation. The DOJ attorney also posted on her Facebook page photographs of property allegedly owned by the target of the criminal investigation.

OPR conducted an investigation and found that the DOJ attorney's statement regarding her travel to a particular location in connection with an investigation was generic and did not reveal grand jury material or confidential client information. With respect to the photograph, although the DOJ attorney included the target's name in a caption accompanying the photo, the property itself was not related to the grand jury's investigation and nothing on the DOJ attorney's Facebook page identified the property as being associated with a criminal investigation. Moreover, the photographs were personal photos taken by the DOJ attorney with her own camera. The information and the photograph were removed from the Facebook page after the complaint was brought to the DOJ attorney's attention.

OPR concluded that the DOJ attorney's conduct in this matter did not constitute professional misconduct. OPR found that the information on the Facebook page did not constitute grand jury information, within the meaning of Federal Rule of Criminal Procedure 6(e). OPR further concluded, however, that the DOJ attorney exercised extremely poor judgment by posting sensitive law enforcement information on a social media site, which could have jeopardized the government's case. OPR's poor judgment finding was referred to the component to address in a management context.

*Failure to Disclose Exculpatory Evidence; Failure to Disclose Rule 16 Information.* Approximately one year after the defendant's conviction for a violent crime, the DOJ attorney who prosecuted the case obtained a previously undisclosed forensic analysis report that excluded the defendant as the source of DNA found on crime scene evidence. The report had been created by a state law enforcement agency just prior to trial but was never produced to the defense. Notwithstanding the vacating of the conviction, the defendant remained incarcerated for other, unrelated convictions.

OPR initiated an investigation and obtained documents and e-mails from the DOJ component; documents, e-mails, text messages and telephone records

from the law enforcement agency; and documents and information from the laboratory that conducted the DNA analysis. OPR also conducted interviews.

Based upon its investigation, OPR could not determine by a preponderance of the evidence who was responsible for the disclosure violation. While critical of the performance of the agencies involved, OPR found that the discovery violations were mitigated because the DOJ attorney timely notified defense counsel that: (1) DNA testing on the evidence revealed the DNA of three persons, whose identities had yet to be determined; and (2) DNA samples had been taken from the defendant and her alleged accomplice and submitted for comparison to the DNA found on the crime scene evidence. OPR found that the prosecution team members and their agencies, including the laboratory that conducted the DNA testing, all contributed to the discovery failure.

OPR could not find by a preponderance of the evidence, however, that the DOJ attorney engaged in professional misconduct or exercised poor judgment with respect to the government's failure to disclose the DNA results to the defense because OPR was unable to determine when the DOJ attorney learned of the exculpatory DNA results. The DOJ attorney, however, was an inexperienced prosecutor, and while she should have requested the results of the DNA testing prior to trial, OPR did not find that her failure, under the circumstances, constituted professional misconduct. OPR referred its findings to the DOJ attorney's component and to law enforcement agencies to address in a management context.

*Failure to Disclose Exculpatory Evidence; Failure to Disclose Impeachment Evidence.* OPR initiated an investigation of a district court's finding that the government had committed *Brady* and *Giglio* violations by belatedly disclosing during trial evidence demonstrating a government witness' bias against the defendants. The court also expressed concern that the government failed to correct the record when it allegedly elicited false testimony from that same witness. Although the court found that the government did not commit intentional misconduct, it harshly criticized the DOJ attorneys for their discovery failures and for their handling of the witness' testimony, and imposed several significant remedial sanctions against the government.

Because the prosecution team consisted of attorneys and agents from another federal agency, as well as the DOJ, OPR conducted its investigation with the assistance of the other agency's Office of the Inspector General. The investigation concluded that the prosecution team did not intentionally withhold impeachment evidence from the defendants or act in reckless disregard of the government's discovery obligations regarding that evidence. OPR found that the DOJ attorneys made mistakes when they failed to recognize that a small number of documents contained *Giglio* or Federal Rule of Criminal Procedure Rule 16 material that required disclosure to the defendants. OPR found that the defendants were not prejudiced by the mid-

trial disclosure of those documents because they were able to use them effectively at trial.

OPR found further that the DOJ attorney who questioned the witness on direct examination did not suborn perjury and did not violate an obligation to inform the court that a portion of that testimony might be false or misleading. OPR found that although the witness was biased against the defendants, the government had a right to sponsor his testimony, and the DOJ attorneys did not violate any professional obligations by doing so.

Finally, OPR found that the DOJ attorney who prepared the witness and examined him at trial made several serious mistakes in connection with that testimony, including failing to adequately prepare the witness for cross-examination regarding important aspects of his testimony, and failing to read documents embarrassing to the witness that were timely disclosed to the defense. OPR found, however, that the DOJ attorney's mistakes did not constitute professional misconduct or poor judgment, and were more appropriately addressed as a management issue. OPR referred its findings to the DOJ attorneys' components for appropriate action in a management context.

*Failure to Maintain Active Membership in a State Bar; Unauthorized Practice of Law.* A DOJ attorney reported to OPR that she was removed by her state bar from the list of active lawyers because she failed to pay her bar dues and then registered only as an inactive member of the bar. Upon being informed by the state bar that the attorney owed bar dues, the attorney paid her bar dues but then registered only as an inactive member of the bar. Based upon her prior experience as a federal law clerk, the DOJ attorney was under the mistaken assumption that as a federal employee, she continued to be exempt from paying annual bar dues, which is why she had not paid her bar dues initially. The DOJ attorney registered as an inactive member, and paid the accompanying lower dues amount, because she mistakenly assumed that her non-litigating position in the DOJ did not require her to maintain an active membership in her state bar.

After the DOJ attorney was reminded by a colleague that, as a DOJ attorney, she needed to maintain an active membership in at least one state bar, the DOJ attorney contacted her state bar and paid the necessary dues to achieve active status. During her period of removal and inactive status with her state bar, the DOJ attorney was not a member of any other state bar.

OPR conducted an investigation and concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of her obligation, pursuant to statute and DOJ policy, to at all times be authorized to practice law by maintaining an active membership in at least one state bar. OPR found that the DOJ attorney should have known of her obligation to

maintain an active membership in at least one state bar because, before joining the DOJ, she read, understood, and signed the DOJ's Attorney's Entry-On-Duty Certification Form, which explained her obligation as a DOJ attorney to maintain an active bar membership. Furthermore, the state bar website clearly stated that inactive members are not authorized to practice law. Despite these clear admonitions, the DOJ attorney failed to timely pay her annual bar dues and subsequently registered as an inactive member of her state bar.

OPR further concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of her obligation to comply with her state bar's rule of professional conduct prohibiting the unauthorized practice of law. During the time that she was not an active member of the bar, the DOJ attorney provided legal services to the DOJ, but her provision of legal services was unauthorized because the DOJ attorney was not an active member of her state bar as required by statute and DOJ policy.

OPR referred its findings of misconduct to the DOJ attorney's component, which imposed a 5-day suspension. OPR also referred its misconduct findings to the appropriate state bar disciplinary authorities.

*Failure to Disclose Impeachment and Jencks Act materials; Violation of Obligation to Supervise Attorneys.* Before trial in an ongoing criminal case, a DOJ supervising attorney initiated a collateral investigation and directed two cooperating government witnesses to surreptitiously record their telephone conversations with possible witnesses. Although the investigation failed to materialize into criminal charges, the investigation came to light during the cross-examination of one of the cooperating witnesses at trial in the underlying criminal case.

The district court found that a supervising attorney did not have sufficient grounds to initiate the collateral investigation and did not properly supervise the investigation once it was underway. The district court also found that the supervising attorney and two DOJ line attorneys violated their obligations under *Giglio* and the Jencks Act when they failed to disclose to the defense materials relating to the collateral investigation, including a recording.

OPR conducted an investigation and concluded that although there were sufficient grounds to initiate the collateral investigation, the supervising attorney exercised poor judgment by initiating the investigation under the circumstances and that she acted in reckless disregard of her obligations by failing to notify senior DOJ supervising attorneys that she had initiated the investigation, and by failing to fulfill her disclosure obligations under *Giglio* and the Jencks Act. OPR concluded that the line attorneys acted in reckless disregard of their obligation under the Jencks Act by failing to disclose the recording and that the line attorneys exercised poor judgment in failing to locate and disclose investigative reports relating to the collateral investigation.

OPR referred its misconduct findings to the PMRU, which concluded that the supervising attorney did not engage in professional misconduct. The PMRU found that the supervising attorney was not supervising the case when the disclosure violations occurred. The PMRU credited the supervising attorney's assertion that she believed that she had notified a senior supervising attorney of the collateral investigation, but concluded that the supervising attorney exercised poor judgment because she failed to fully inform the senior supervising attorney of the collateral investigation.

The PMRU also concluded that the failure of the two line prosecutors to disclose the recording did not constitute professional misconduct. The PMRU found that the two line attorneys were walled off from the collateral investigation and that although they knew the recording existed, they were unaware that it contained discoverable material. The PMRU concluded, however, that the two line attorneys exercised poor judgment by not obtaining additional information about the recording from either the supervising attorney or the filter team attorney assigned to the collateral investigation.

The PMRU referred its poor judgment findings against the supervising and line attorneys to the component to address in a management context.

*Improper Disclosure of Confidential Information.* OPR initiated an investigation of an allegation that a DOJ attorney, in connection with an internal DOJ investigation, made unauthorized disclosures to her personal attorneys of a sensitive, but not classified, document, in violation of instructions from her supervisors. The DOJ attorney resigned from the Department prior to the completion of OPR's investigation.

With the concurrence of the Office of the Deputy Attorney General, OPR closed its investigation on the grounds that further investigation would be unlikely to result in a finding of professional misconduct, largely because the relevant ethics rules and case law arguably allow an attorney to provide otherwise confidential materials to her attorney to defend against an accusation of misconduct.

*Failure to Maintain Active Membership in a State Bar.* A DOJ attorney failed to pay her state bar dues for an extended period. As a result, her state bar membership was suspended and she was not an active member of any state bar during that time. Upon learning that her bar membership had been suspended, the DOJ attorney immediately contacted her state bar and paid her dues. The state bar retroactively reinstated the DOJ attorney's active membership status to the date of her suspension. During the period of her suspension, the DOJ attorney certified to the Department on two occasions that she was an active member of the state bar.

OPR conducted an investigation and concluded that the DOJ attorney engaged in professional misconduct by acting in reckless disregard of her obligation to comply with Department policy when she certified to the Department on two occasions that her state bar membership was active when, at the time of her certifications, her state bar membership had been suspended for non-payment of dues. OPR found that the DOJ attorney took no steps to ensure that she was in compliance with her active bar membership requirement before certifying to the Department that she was in compliance. OPR also concluded that because she was fully reinstated retroactively by the bar, the DOJ attorney did not engage in misconduct by failing to maintain an active bar membership, but that she exercised extremely poor judgment in the handling of her bar license when she failed to pay her state bar dues for an extended period.

OPR referred its misconduct findings to the DOJ attorney's component for a determination as to discipline. The DOJ attorney was issued a letter of reprimand by the component.

*Whistleblower -- Retaliation for Protected Disclosure.* A DOJ employee alleged that she made a protected disclosure when she filed a complaint with the Department's Office of the Inspector General (OIG) alleging ineffective management at an FBI office, because that office had acted in dereliction of its duty to address harassment, possible discrimination, and a hostile work environment. The complainant also alleged that she made a protected disclosure when she filed a follow-up complaint with the OIG alleging that the FBI's Equal Employment Opportunity (EEO) system was designed to discourage employees from filing complaints. The complainant alleged that two FBI supervisors retaliated against her for making the protected disclosures by attempting to prevent her from submitting ideas to the FBI Save Program, a program that was intended to help save the FBI money. In addition, the DOJ employee alleged that FBI management made unfavorable remarks about her and lowered her ratings on certain critical elements in her performance appraisal because of the OIG complaints (but did not lower her overall summary rating).

OPR conducted an investigation, but did not find reasonable grounds to believe that FBI management retaliated against the DOJ employee for the alleged protected disclosures regarding the alleged improprieties and alleged mishandling of the FBI's EEO system. OPR found that the alleged protected disclosures did not constitute evidence of a violation of any law, rule, or regulation, and did not evidence mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. With regard to the DOJ employee's ratings on her performance appraisal, OPR concluded that there was no causal relationship or nexus between the ratings she received on the individual critical elements and the OIG complaints, because there were sufficient factual reasons given for the

ratings she received. In addition, the evaluating supervisors were unaware that the DOJ employee had filed the OIG complaints.

OPR advised the DOJ employee of the results of its investigation.

## **Conclusion**

During Fiscal Year 2013, Department of Justice attorneys continued to perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency. When Department attorneys engaged in misconduct, exercised poor judgment, or made mistakes, they were held accountable for their conduct. OPR participated in numerous educational and training activities both within and outside the Department, and continued to serve as the Department's liaison with state bar counsel. On the international front, OPR met with delegations of several foreign countries to discuss issues of prosecutorial ethics. OPR's activities in Fiscal Year 2013 have increased awareness of ethical standards and responsibilities throughout the Department of Justice and abroad, and have helped the Department meet the challenge of enforcing the laws and defending the interests of the United States in an increasingly complex environment.